SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~423~~ 5

FRED L. SHUTTLESWORTH, PETITIONER,

vs.

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

INDEX

	Original	Print
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama, in and for Jefferson County		
Organization of court	1	1
Appeal bond	1	1
Complaint	2	2
Motion to quash	3	3
Demurrers	5	5
Motion to exclude the testimony and for judgment	7	7
Motion for new trial	8	8
Judgment entry	10	10
Appeal bond to Court of Appeals	13	12
Transcript of hearing	15	14
Appearances	15	14
Testimony of Officer Robert L. Byars—		
direct	16	15
cross	21	20
redirect	40	38

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	Original	Print
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama, in and for Jefferson County—Continued		
Transcript of Hearing—Continued		
Testimony of Officer James P. Renshaw—		
direct	41	39
cross	44	42
redirect	60	58
Officer C. W. Hallman—		
direct	61	58
cross	63	60
John D. Allred—		
direct	68	66
cross	70	67
Officer Cecil W. Davis—		
direct	75	73
cross	77	75
James Armstrong—		
direct	82	79
cross	90	87
redirect	91	88
Robert J. Norris—		
direct	93	90
cross	100	97
redirect	101	98
Walter King—		
direct	102	99
Simpson Hall—		
direct	109	106
cross	113	109
redirect	113	110
Fred L. Shuttlesworth—		
direct	114	111
cross	121	118
redirect	124	121
recross	127	124
James S. Phifer—		
direct	128	125

	Original	Print
Record from the Circuit Court of the Tenth Judicial Circuit of Alabama, in and for Jefferson County—Continued		
Transcript of Hearing—Continued		
Testimony of Officer James P. Renshaw—(recalled)—direct	137	133
Clerk's certificate (omitted in printing)	140	135
Assignments of error	141	135
Proceedings in the Court of Appeals of Alabama	142	136
Judgment	142	136
Per curiam opinion	143	137
Application for rehearing and overruling thereof	147	141
Proceedings in the Supreme Court of Alabama	148	142
Docket entries	148	142
Petition for writ of certiorari to the Court of Appeals	150	142
Order denying writ and dismissing petition	154	146
Application for rehearing	155	146
Order overruling application for rehearing	155A	147
Clerks' certificates (omitted in printing)	156	147
Order extending time to file petition for writ of certiorari	158	148
Order allowing certiorari	159	149

[fol. 1]

IN THE CIRCUIT COURT OF THE

TENTH JUDICIAL CIRCUIT OF ALABAMA

IN AND FOR JEFFERSON COUNTY

No. 23953

THE STATE, CITY OF BIRMINGHAM,

vs.

F. L. SHUTTLESWORTH.

ORGANIZATION OF COURT

At a regular term of the Circuit Court of the Tenth Judicial Circuit of Alabama, at which the officers authorized by law to hold or serve said Court were serving, the following proceedings were had in cause styled:

IN THE CIRCUIT COURT OF THE

TENTH JUDICIAL CIRCUIT OF ALABAMA

CITY OF BIRMINGHAM

APPEAL BOND—Filed May 18, 1962

The State of Alabama,
Jefferson County.

We, Fred L. Shuttlesworth, principal and James Esdale sureties, acknowledge ourselves indebted to the City of Birmingham, a municipal corporation, in the sum of Three Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our administrators, and executors. But the condition of the above obligation is such, that whereas the above bounden principal was tried and convicted on the charge of Count 1. Violation Section 1142-G.C.C. As amended Ordinance 1436 F. Count 2. Violation

Section 1231-G.C.C. and has prayed and obtained an appeal to the Circuit Court of Jefferson County, Alabama, from the judgment of the Recorder's Court of the City of Birmingham, adjudging him to pay a fine of One Hundred Dollars, Costs Five Dollars; Fees none Dollars, and to perform hard labor for 180 Days, rendered the 5 day of April 1962.

Now, if the said principal shall appear at present Term of the Circuit Court of Jefferson County, Alabama, and from term to term thereafter until discharged by law, then this obligation to be void, otherwise to remain in full force and effect. And as against this obligation we waive all right under the laws of Alabama to claim any personal property as exempt from levy and sale.

Witness our hand and seals this 5 day of April 1962.

F. L. Shuttlesworth (L.S.) 3164 29 Ave N
James Esdale (L.S.) 809 No 21st St. Bham.

By A. E. Brooks (L.S.) Atty in fact

[fol. 2] Approved 5th day of April 1962.

Chas. H. Brown, Recorder of the City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 23953

[Title omitted]

COMPLAINT—Filed in Open Court October 29, 1962

Count One

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution

and within the City of Birmingham, or the police jurisdiction thereof, did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at, to-wit: 2nd Avenue, North, at 19th Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F.

Count Two

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did refuse to comply with a lawful order, signal or direction of a police officer, contrary to and in violation of Section 1231 of the General City Code of the City of Birmingham.

William C. Walker, Attorney for City of Birmingham.

[File endorsement omitted]

[fol. 3]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 23953

[Title omitted]

MOTION TO QUASH—Filed in Open Court October 29, 1962

Comes now the defendant in this cause, and respectfully shows unto this Honorable Court the following facts:

1. That this defendant was arrested on to-wit, April 4, 1962, and charged with the violation of Sections 1231 and 1142 of the General City Code of Birmingham, 1944.

2. That said arrest came as a result of defendant walking the streets in downtown Birmingham.

3. The complaint is not sufficient to support the ordinance under which the defendant was arrested.

4. The affidavit, or information, or warrant, alleging that the defendant violated Sections 1231 and 1142 of the General City Code of Birmingham, 1944, is so broad that the defendant is not sufficiently apprised of what he is called upon to defend against, and, therefore, the charge is vague, indefinite and uncertain.

5. The affidavit, or information, or warrant, upon which this cause is based is insufficient to support prosecution in this cause, in that no offense is alleged which is cognizable by this Honorable Court.

6. That the allegations of the complaint, and each count thereof, are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

7. The said Sections 1231 and 1142, of the 1944 General City Code of Birmingham, under which said complaint is brought, as applied to this defendant, violates Section 4, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

8. That the aforesaid Sections 1231 and 1142 as applied [fol. 4] to the defendant is unconstitutional on its face, and that it is so vague, as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment of the United States.

9. That the said Sections 1231 and 1142 as applied to the defendant, constitutes an abridgement of privileges and immunities guaranteed defendant as a citizen of the United States in violation of the Fourteenth Amendment to the United States Constitution.

10. That the said Sections 1231 and 1142, as applied, constitute a denial of the equal protection of the laws, in

violation of the Fourteenth Amendment to the Constitution of the United States of America.

11. For that said complaint is vague, indefinite and uncertain and in the event of a conviction, it would deprive the defendant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

12. For that said statute is on its face unconstitutional in that it deprives the defendant of the due process of law under the 14th Amendment to the United States Constitution and it violates Article 1, Section 6, Alabama Constitution, 1901.

Respectfully submitted,

Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 23953

[Title omitted]

DEMURRERS—Filed in Open Court October 29, 1962

Comes now F. L. Shuttlesworth, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That Sections 1142 as amended by Ordinance No. 1436, and 1231 of the 1944 General City Code of Birmingham, Alabama, are invalid in that they violate Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Sections 1142 as amended by Ordinance No. 1436 and 1231 of the 1944 General City Code of Birmingham, Alabama, which supports the complaint, affidavit or information in this cause, constitutes an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinances are unconstitutional on [fol. 6] their face in that they are so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That said Ordinances or Statutes constitute an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That said Ordinances constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Orzell Billingsley, Jr., Attorney for Defendant.

[File endorsement omitted]

[fol. 7]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 23953

[Title omitted]

MOTION TO EXCLUDE THE TESTIMONY AND FOR JUDGMENT—Filed in Open Court October 29, 1962

Comes now F. L. Shuttlesworth, defendant in this cause after all of the testimony and evidence for the City of Birmingham has been given and received and moves this court to exclude said testimony and evidence and to give judgment for defendant, and as grounds for said Motion sets out and assigns the following, separately and severally:

1. The City of Birmingham has not made a case against this defendant, under either count of the complaint in this cause.

2. All of the testimony and evidence given in this cause indicates that defendant during the time and on the occasion in question merely was exercising rights and privileges given to him as a citizen of the City of Birmingham and of the United States of America by the laws and the constitution of the State of Alabama, and by the First and Fourteenth Amendments to the Constitution of the United States of America.

3. There has been absolutely no evidence introduced by the City of Birmingham to support the complaint or warrant in this cause.

4. All of the testimony and evidence offered by the City of Birmingham does not prove defendant guilty of any violation of a Municipal Ordinance during the time in question.

Orzell Billingsley, Jr., Peter A. Hall.

[File endorsement omitted]

[fol. 8]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 23953

[Title omitted]

MOTION FOR NEW TRIAL—
Filed in Open Court October 30, 1962

Now comes the defendant, F. L. Shuttlesworth, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit, the day of , 1962, and that this Honorable Court will grant the said defendant a new trial, and as grounds for said Motion sets out and assigns the following:

1. That the verdict of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the verdict of the court is not sustained by the great preponderance of the evidence in the case.

5. For that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the verdict of the court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. The Court erred in overruling defendant's demurrers, filed in this cause.

9. The Court erred in overruling defendant's Motion to Quash.

10. The Court erred in overruling the defendant's Motion to exclude the evidence in this cause.

11. For that the Court erred in sustaining objections, by the City of Birmingham, to evidence the defendant sought to introduce in his behalf in this cause.

[fol. 9] 12. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant constituted an abridgement of freedom of speech, violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

13. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Defendant.

The foregoing Motion being presented this 30th day of October, 1962, is hereby set for hearing before the Honorable George Lewis Bailes, Judge, on the day of , 1962, at o'clock, .M.

....., Judge.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 10]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

[Title omitted]

Appealed from Recorder's Court

(Violating Section 1142 and Section 1231,
General City Code)

Honorable Geo. Lewis Bailes, Judge Presiding.

JUDGMENT ENTRY

This the 29th day of October, 1962, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and defendant withdraws jury demand and the City of Birmingham files written Complaint in this cause, and the defendant files motion to quash said complaint and said motion to quash being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled; and the defendant files demurrers and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, and said defendant being duly arraigned upon the Complaint in this cause, for his plea thereto says that he is not guilty and the defendant files motion to exclude the testimony and for judgment and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled.

This the 30th day of October, 1962, the defendant renews his motion to exclude the testimony and for judgment and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled.

Upon consideration of the pleadings and evidence submitted in this cause, the Court is of the opinion that the defendant is guilty as charged in the Complaint and it is therefore the judgment and sentence of the Court that said

defendant is hereby sentenced to pay a fine in the sum of One Hundred Dollars ($100.00) and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of One Hundred Dollars [fol. 11] ($100.00) and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, the said F. L. Shuttlesworth, perform hard labor for the City of Birmingham for 52 days, because of his failure to pay said fine of $100.00 and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law that the defendant, the said F. L. Shuttlesworth, perform additional hard labor for the City of Birmingham for 180 days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to Twenty-eight and 45/100 Dollars ($28.45), not being presently paid or secured, and $4.00 of said amount being, State Trial Tax $3.00 and Law Library Tax $1.00, leaving Twenty-four and 45/100 Dollars ($24.45) taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for nine days, at the rate of $3.00 per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended, including the costs of feeding the defendant while in jail, for which let execution issue.

This the 30th day of October, 1962, said defendant files motion for new trial and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled.

This the 30th day of October, 1962, Notice of Appeal being given and it appearing to the Court that, upon the [fol. 12] trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at Three Hundred Dollars ($300.00), conditioned as required by Law.

[fol. 13]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

APPEAL BOND TO COURT OF APPEALS—Filed October 30, 1962

Appeal Bond—Hard Labor Sentence

The State of Alabama
Jefferson County

Know All Men by These Presents, That we F. L. Shuttlesworth principal, and Jas. Esdale; Willie Esdale & Esdale Bail Bond Co., as sureties, are held and firmly bound unto the State of Alabama in the sum of Three Hundred & no/100—Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama as against this bond.

The Condition of the Above Obligation Is Such, That whereas, the above bounden F. L. Shuttlesworth was on the 30 day of Oct. 1962, convicted in the Circuit Court of Jefferson County, Alabama, for the offense of VS 1142 & 1231 and had assessed against him a fine of One Hundred & no/100—Dollars, together with the cost of this prosecution, and on the 30 day of Oct. 1962, on failure to pay fine was

sentenced to perform hard labor for the City of Birmingham for 180 days, and an additional term for the cost, at the rate of seventy-five cents per day, and as additional punishment imposed the defendant was sentenced to perform hard labor for the County for ....., from which sentence the said F. L. Shuttlesworth has this day prayed and obtained an appeal to the Court of Appeals of Alabama.

Now, If the Said F. L. Shuttlesworth shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the appeal is dismissed, the said F. L. Shuttlesworth shall surrender himself to the Sheriff of Jefferson County, at the County Jail, within fifteen days from the date of such affirmation or dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

Given under our hands and seals, this the 30 day of Oct. 1962.

[fol. 14] F. L. Shuttlesworth (L.S.), Jas. Esdale (L.S.), Willie Esdale (L.S.), By Jas. Esdale, Atty in fact (L.S.), Esdale Bail Bond Co. (L.S.), By Jas. Esdale.

Approved: Oct. 30, 1962, Julian Swift, Clerk of the Circuit Court of Jefferson County.

[File endorsement omitted]

[fol. 15] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
CRIMINAL DIVISION
No. 23953

CITY OF BIRMINGHAM, Plaintiff,

vs.

F. L. SHUTTLESWORTH, Defendant.

Transcript of Hearing—October 29 and 30, 1962

The Above-styled Cause came on to be heard before the Honorable George Lewis Bailes, Judge, commencing on October 29, 1962, at 10:50 A.M., when the following proceedings were had and done:

APPEARANCES

William C. Walker, Assistant City Attorney, Birmingham, Alabama, for the Plaintiff.

Peter Hall, and Orzell Billingsley, Attorneys at Law, Birmingham, Alabama, for the Defendant.

Reported by Jimmie Crumley

PROCEEDINGS

Mr. Walker: Is it all right to try these two cases together?
Mr. Billingsley: Yes, sir.
Mr. Walker: The charges are identical.
The Court: Counsel ready?
Mr. Walker: Yes, sir, Your Honor.
Mr. Billingsley: We are ready, Your Honor.
Mr. Hall: If Your Honor please, we have a motion to quash the complaint.

Mr. Walker: Judge Bailes, I would like for the record to show that by agreement or stipulation the case of James S. [fol. 16] Phifer, No. 23944, and Fred L. Shuttlesworth, No. 23953, will be consolidated and tried together, the City being the Plaintiff in each case.

Mr. Billingsley: Your Honor, before proceeding the Defendant would like to file a motion to quash in both cases, No. 23953 and 23944.

The Court: Are they identical?

Mr. Billingsley: Yes, sir.

The Court: Let the motions be overruled.

Mr. Billingsley: Take exception.

Your Honor, at this time the Defendants would like to file demurrers in both cases.

The Court: I imagine in substance the same legal principles are set out?

Mr. Billingsley: Well, generally you might say with few exceptions.

The Court: Well, let the demurrers be overruled.

Mr. Billingsley: We take exception.

Your Honor, we would like to ask for the rule.

(Whereupon the rule as to witnesses was invoked.)

EVIDENCE ON BEHALF OF THE CITY

Officer ROBERT L. BYARS, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name, please, sir.
A. Robert L. Byars, Jr.
Q. What is your occupation?
A. Police patrolman, City of Birmingham, Alabama.
Q. How long have you been so employed?
A. Four years.
Q. Do you know the defendants in this case?
A. At the present time, yes, sir.

Q. Would you point them out, please?

A. The one with glasses on is Defendant Phifer, the [fol. 17] other is Defendant Shuttlesworth, the second one to the left.

Q. Now, Officer Byars, did you have an occasion to see these defendants, or either of them, on or about April 4th of 1962?

A. Yes, sir, I did.

Q. About what time did you first see the defendants?

A. Approximately 10:30 A.M.

Q. Now, tell the Court where you were at the time you first saw the defendants?

A. I was located just north of the alley between 2nd and 3rd Avenue North on 19th Street in the City of Birmingham.

Q. Was that at the alley?

A. Yes, sir, just north of the alley, on the west side of 19th Street.

Q. Where is that in relation to Newberry's Department Store?

A. It would be to the north.

Q. Was it close to Newberry's Department Store?

A. Yes, sir.

Q. Where was the defendants at that time?

A. They were walking south on 19th Street towards 2nd Avenue North.

Q. Did you know who they were at that time?

A. Not by name, no, sir.

Q. Were the defendants alone or in company or—

A. They were in company with three or four other people.

Q. What did you see the defendants do then, if anything?

A. I saw them walk south on 19th Street, and as they got farther toward 2nd Avenue I entered the alley entrance to Newberry's store.

Q. Now, what was the last thing you saw the defendants do at that time?

A. Walking south on 19th Street towards 2nd Avenue on the west side.

Q. Did you go into Newberry's store?

A. Yes, I did.

Q. Did you have occasion to see the defendants thereafter?

A. I walked in Newberry's store and walked up to the [fol. 18] front entrance, which is located on the northwest corner of the intersection of 2nd Avenue and 19th Street; I saw them outside the store standing with a group of some ten or twelve people all congregated in one area.

Q. And these defendants were members of that group?

A. Yes, they were.

Q. Now, was there any other pedestrian traffic at that time?

A. There was some people moving back and forth.

Q. Were they members of this group that was standing there?

A. Not the ones moving, no, sir.

Q. Were the ones that were walking along there, were they able to walk down the street without any obstruction?

A. No, sir. On some occasions people who were walking in an easterly direction on the north side of 2nd Avenue had to go into the street to get around the people who were standing there.

Q. What was this group of people doing, if anything?

A. Standing and listening and talking.

Q. How many people in your opinion was in the group?

A. In my best judgment ten or twelve people.

Q. Was that more than was in the group you saw walking beside Newberry's store when you were at the alley?

A. Yes, sir.

Q. There was more?

A. Yes, sir.

Q. Now, where was this group of people standing?

A. They were standing in the western half of the western cross walk of 2nd Avenue and 19th Street North.

Q. Is that on the same corner that Newberry's is on?

A. Yes, sir, it is.

Q. Where were you when you first saw them standing on this corner?

A. I was inside Newberry's store.

Q. You had walked from the alley entrance to the front entrance through the store?

A. Yes, sir.

[fol. 19] Q. Did you observe the defendants in the group for any length of time?

A. In my best judgment for a minute to a minute and a half while they stood.

Q. What did you do then after observing them, if anything?

A. I walked out of the store and informed the group of people they would have to move on and clear the sidewalk so as to allow free passage and not to obstruct it.

Q. What did you tell them again, please?

A. I told them they would have to move on and clear the sidewalk and not obstruct it for the pedestrians.

Q. What did they say or do, if anything?

A. Well, some of the group began to move gradually away.

Q. What happened then? Just tell in your own words.

A. Not all of them began to move, and I waited for a short time and again informed them they would have to move and not obstruct the sidewalk and allow free passage for the pedestrians east and west, at which time the Defendant Shuttlesworth stated, "You mean to say we can't stand here on the sidewalk?"

Q. What did you say in response?

A. I said nothing in return. I only hesitated again for a short time and informed them for the third and last time I was informing them they would have to move and clear the sidewalk or else they would be placed under arrest for obstructing the sidewalk, at which time the Defendant Shuttlesworth responded with the statement, "Do you mean to tell me we can't stand here in front of this store?" At which time I informed him he was under arrest. And then he said, "Well, I will go into the store," and started toward Newberry's department store.

Q. What happened then, if anything?

A. He got inside the door and I reached and got him and told him again he was under arrest.

Q. When you arrested the defendant on that occasion, what happened, if anything?

[fol. 20] A. I took him into custody and walked with him with my hand placed on his arm, after having informed him he was under arrest, to the west curb just north of 2nd Avenue on 19th Street.

Q. Did you ever see the Defendant Phifer at that time or about that time?

A. After Defendant Shuttlesworth had been placed into custody and taken to the west curb to await transportation to the City Jail the Defendant Phifer approached and began conversing with the Defendant Shuttlesworth.

Q. What happened then, if anything?

A. I informed the Defendant Phifer that Shuttlesworth was under arrest and in custody of the Police Department and he was not able at this time to talk with him since he was a prisoner.

Q. What happened? Did the Defendant Phifer cease talking to the Defendant Shuttlesworth?

A. The Defendant Phifer continued to talk with him.

Q. What happened then, if anything?

A. I informed him if he did not move away and discontinue his conversation with the Defendant he too would be placed under arrest and taken to the City Jail.

Q. Did you arrest the Defendant Phifer?

A. Yes, I did.

Q. When you first observed the group that was standing on the corner at Newberry's do you know if the Defendant Phifer was in that group?

A. I didn't know him by his name, but he was in the group present at that time.

Q. Did you see the Defendant Phifer when you first saw the Defendant Shuttlesworth walking down 19th Street?

A. He was with Shuttlesworth, but again, I did not know him by name at that time.

Q. Did either of these two defendants, or any other person in their presence that was in the group they were in, did any of them state their purpose for being on the street corner?

A. No other person made any statement to me other than [fol. 21] the Defendant Shuttlesworth and the Defendant Phifer.

Q. And what statements did they make, if any?

A. Shuttlesworth stated, "We are just standing here on the street." On the second occasion he stated to me, "Do you mean to tell me we can't go into the store?" And on the third occasion he stated, "Well, I will go in the store."

Q. But he was under arrest at that time?

A. No, not at that time. At the time of the last statement when he said, "We will go into the store," he had been placed under arrest at that time.

Q. You testified a moment ago some pedestrians had to step off the curb. Was traffic heavy at that time—pedestrian traffic?

A. I would say it was normal for a Wednesday at that particular time of day.

Q. And you saw some people step off the curb?

A. Yes, sir.

Q. Was that necessary?

A. Due to the people moving in a westerly direction along 2nd Avenue they would have had to have waited until those people got by or either elect to go onto the street to pass the group of people standing there.

Mr. Walker: I believe that is all.

Cross examination.

By Mr. Hall:

Q. Mr. Byars, I am going to attempt to draw a picture of the intersection and I hope I can get a reasonable facsimile. (Drawing on blackboard) Now, this is 19th Street and this is 2nd Avenue. This is Newberry's. (Indicating) Do you understand what I am trying to draw here? 19th Street running up and down from north to south and intersects with 2nd Avenue.

A. I understand.

Q. This is the Newberry's corner right on the northwest corner of that intersection. I believe you testified with

reference to some phone booth and some telephone poles there at that corner. About where would you say that phone booth is?

[fol. 22] A. I don't recall testifying to a telephone pole or telephone booth.

Q. Well, you did in the police court, let's say.

A. I did in the police court, yes.

Q. Do you recall ever having testified about the phone booth?

A. Yes, I do.

Q. Would you say there is a phone booth there?

A. There was at that time.

Q. About where was it?

A. There are two poles located and a telephone booth.

Q. Would you mind showing us on that picture, please, sir, about where the poles are and where the booth is?

A. If I have permission, I will show you the cross walk too.

Q. Yes, sir, fine, the entire setup.

A. I would say the phone booth is approximately here, and the poles on each side (drawing on diagram).

Q. Now, where is the cross walk east to west on 19th Street?

A. (Indicating).

Q. Now, Mr. Byars, with reference to this particular intersection, the phone booth and the crosswalk, where would you say the Defendants were standing at the time you made the arrest?

A. Just east and north of the cross walk on the sidewalk.

Q. Would you show us again?

A. (Indicating on diagram).

Q. Now, Mr. Byars, they were standing about where you drew that little X mark?

A. That is where the Defendant Shuttlesworth was.

Q. That left more than half of the north-south cross walk free, is that correct?

A. If he was there alone would it have left it?

Q. Well, we are only concerned with these defendants,

Mr. Byars. We don't know what other persons made up the crowd.

A. Would you restate the question?

Q. I say assuming the defendants were standing where [fol. 23] you drew that little mark there, that would have left more than half of your north-south cross walk free, would it not?

A. That is true.

Q. And they didn't block the east-west cross walk at all, did they?

A. They did not.

Q. Now, Mr. Byars, what is your rank, please, sir?

A. Patrolman.

Q. How long have you been with the Birmingham Police Department?

A. About four years.

Q. Have you had occasion before April 4, 1962 to arrest the Defendant Shuttlesworth?

A. Never.

Q. Have you been present on occasions when he has been tried in the City court or any other court?

A. Never.

Q. Do you know the Defendant Shuttlesworth or Phifer by sight or reputation before April 4, 1962?

A. I did not.

Q. You had never heard of either of these two people?

A. I had heard of them.

Q. You knew that they had been frequently arrested by the police of the City of Birmingham, did you not?

A. Not to my knowledge that they had been frequently arrested.

Q. You did not know that they had been—you were not aware of that fact on April 4, 1962?

A. Other than what I read.

Q. You had read that they had been frequently arrested?

A. But that does not make me aware of it.

Q. You had read it in the daily newspapers?

A. I am still not aware of it. I had read it, yes.

Q. How many times had you read about the Defendant Shuttlesworth's arrest prior to that?

Mr. Walker: We object to the number of times he read [fol. 24] about—I think the Court would probably take judicial notice of the history of—

The Court: Let him answer if he can.

A. I believe on two occasions I had read of his arrest.

Q. Did you know on the occasion of his arrest on April 4, 1962 he and the Reverend Phifer, the other defendant, had just been released from jail?

A. I did not.

Q. You didn't read that in the daily newspapers?

A. No.

Q. You didn't see it on the television shows?

A. No.

Q. You didn't hear it on the radio?

A. I did not.

Q. You had not read prior to that time that he had been imprisoned for more than a month?

A. I was aware that he had been in the City Jail.

Q. You had never seen his picture before that time?

A. I believe so.

Q. You had seen him on the television screen before that time?

A. I believe so.

Q. You were familiar with his face and features, were you not?

A. I was not.

Q. Tell me, Officer Byars, what was your usual duties on April 4, 1962?

A. I was in charge of the direction and movement of all traffic at 3rd Avenue and 19th Street and four blocks in an east, west, north and south direction.

Q. What are your duties now, Officer Byars?

A. The same.

Q. What were your duties on March 4, 1962?

A. I don't recall.

Q. On April 3, 1962?

A. I was off that day I believe.

[fol. 25] Q. April 2, 1962?

A. I don't recall. I am a utility officer.

Q. What does that mean?

A. I am assigned to different locations each day, or was at that time.

Q. How long did your assignment which you had on April 4, 1962 last?

A. From 10:00 A.M. to 6:00 o'clock P.M.

Q. Was the occasion of your assignment on April 4, 1962 the fact there had been a selective buying campaign introduced in Birmingham by some unidentified Negroes?

A. It was not.

Q. Isn't it a fact it was a part of your duties to survey that section and attempt to ascertain, if possible, who was behind the particular selective buying campaign?

A. I was in charge of the traffic movement in that particular area in which I was assigned at that time.

Q. You were aware of the fact there was a boycott or selective buying campaign going on at that time, were you not?

A. Not aware of the fact. I had heard that there was.

Mr. Walker: We object. This is getting pretty far afield about boycott and selective buying campaign, whether this Officer knew about it or not is immaterial.

Mr. Hall: If Your Honor please, part of our case is that the Officer arrested the Reverend Shuttlesworth and the Reverend Phifer as a part of a campaign of harassment rather than because of violation of a City ordinance, and we would like to show that if possible.

Mr. Walker: We suggest, Your Honor, counsel ask if the Officer knows whether or not the defendants were part of the boycott or not.

Mr. Hall: We have to establish it first, Mr. Walker. We are asking if he knows about it.

The Court: What is the question?

[fol. 26] Mr. Hall: We asked the Officer if he knew there was a selective buying campaign being waged by Negroes in

Birmingham on April 4, 1962. That is the date of the Defendants' arrest.

The Court: Let him answer.

A. Not to my knowledge.

Q. You had not been informed that there was such a campaign in effect?

A. By whom?

Q. By anyone.

A. By people on the street.

Q. You had been informed by the store owners themselves?

A. Not by the store owners.

Q. Had you seen any leaflets—mimeographed sheets and announcements to the effect that there was a selective buying campaign going on?

A. I had not.

Q. You had not been informed there was such a campaign going on by your superiors?

A. I had not.

Q. Officer Byars, I believe when you first observed these defendants you said you were north of the alley. That is 2nd or 3rd Alley?

A. The alley between 2nd Avenue and 3rd Avenue North.

Q. What alley would that be called?

A. I suppose it would be called 2nd Alley.

Q. You were north of that alley when you first observed these defendants?

A. Yes.

Q. That is about the middle of the block, would that be about correct, sir?

A. If the store was drawn to the alley.

Q. About right there? That is Newberry's. (Indicating) Now, you were on the north side of the alley when you first saw the defendants?

[fol. 27] A. That is true.

Q. What were they doing when you first saw them?

A. Walking south.

Q. Were they violating any ordinance at that time?

A. Not to my knowledge.

Q. Were they obstructing traffic at that time?

A. Not at that time.

Q. Now, what did you do when you saw them immediately after observing them?

A. Went into the store.

Q. You went into the alley entrance of the store and proceeded immediately to the front of the store?

A. Not immediately.

Q. How long did it take you, sir?

A. In my best judgment some forty-five seconds.

Q. That is pretty quick, isn't it?

A. Not to walk a half block.

Q. Forty-five seconds after you entered the alley entrance. Let's see, now, about how many feet would you say it is from the alley to 2nd Avenue?

A. Maybe 250 feet.

Q. And then in forty-five seconds you walked that 250 feet, is that correct?

A. It is my best judgment.

Q. And you went past customers on the inside of Newberry's and went straight through and it took you forty-five seconds, but you went directly to the front of the store?

A. From the alley to the front directly.

Q. Is there a door that faces the intersection from Newberry's department store which would give you a view of the intersection?

A. There is.

Q. What did you do? Did you stand there and observe the defendants or go immediately out to the intersection, or what?

A. I stood inside the store looking out on the street at the traffic.

[fol. 28] Q. How long did you stand there?

A. Some minute and a half.

Q. Now, it took you forty-five seconds to get up here. When you got to this door where were the defendants?

A. In front.

Q. In front where?

A. Where I have drawn the X.

Q. They were standing there?

A. That is true.

Q. When you first saw them were they walking rapidly?

A. Normal pace.

Q. So, when you got there they were already there?

A. That's right.

Q. And you stood there another minute or so watching them?

A. Yes.

Q. Although you had come directly from the alley to the front fairly rapidly?

A. Fairly slow, forty-five seconds.

Q. How many persons were standing there at that intersection when you first observed it?

A. Some ten or twelve.

Q. Were they all colored or white people, or altogether or what?

A. I didn't pay particular notice to the race.

Q. You stood there a minute or minute and a half and then you went out and cleared the intersection?

A. I went out and asked them to move.

Q. Was that great big crowd out there and the intersection completely blocked? You testified you had half of the south-north cross walk free, that the defendants were not blocking half of the south-north cross walk, they were standing in the west part of the cross walk where they should be standing assuming they were going south, they were not blocking the east-west cross walk at all? Now, where was the crowd that was blocking?

[fol. 29] A. They were all standing on the sidewalk.

Q. You mean the crowd?

A. That's right, including the defendant.

Q. Now, you placed the defendants where you have the X. Now, the crowd is what we are interested in now, the crowd they were blocking, where were they?

Mr. Walker: We object. There has been no testimony that there was a crowd that was being blocked; the testimony is there was a crowd blocking the moving traffic.

Q. Are these defendants charged then with assembling the crowd or something? Who were they blocking? Where were the persons they were blocking, these two defendants here?

A. They were blocking half of the sidewalk causing the people walking east to go into the street around them.

Q. The people walking east along what street?

A. Along 2nd Avenue.

Q. Along this way (indicating)?

A. That's right.

Q. The people walking along 2nd Avenue from west to east had to go around them?

A. That is true.

Q. While they stood there?

A. That is true.

Q. And you observed that for a minute or minute and a half?

A. That is true.

Q. And then you went out and you required them to move on. Did you speak directly to the Defendant Shuttlesworth?

A. I spoke to the people standing assembled there.

Q. They all moved but him, is that correct?

A. Not on the first request they didn't all move. Some began to move.

Q. Well, all had moved by the time you made the arrest?

A. Except Shuttlesworth.

Q. Nobody was standing there but Shuttlesworth?

[fol. 30] A. Nobody was standing; everybody else was in motion except the Defendant Shuttlesworth, who had never moved.

Q. Was he talking to you during this time?

A. He made a statement to me on two occasions when I informed him to move on on three occasions.

Q. Did he ask you where you wanted him to move?

A. No.

Q. Did you tell him where to move?

A. I did not.

Q. You didn't arrest anybody but Shuttlesworth?

A. Not at that time.

Q. You didn't know Shuttlesworth?

A. Not at that time.

Q. But you didn't arrest anybody but him?

A. That is true.

Q. Was there a police car on 2nd Avenue at this time?

A. No, there was not. That is a bus lane and buses were in movement at this time through that lane.

Q. What did you do after you arrested the Defendant Shuttlesworth?

A. Took him to the west side of 19th Street just north of 2nd Avenue.

Q. That is along this side? (Indicating)

A. Closer to the cross walk.

Q. What did you do then?

A. Waited until a patrol car came.

Q. Did you call a patrol car, or how did the patrol car get there?

A. Another officer on a motorcycle came up and called the patrol car.

Q. How many officers were on the intersection?

A. I have no knowledge of who was there. I don't make the assignments.

Q. You were in charge of traffic along that street, were you not?

[fol. 31] A. I was.

Q. What do you mean when you say in charge?

A. Of movement of traffic.

Q. But you had nothing to do with the other officers who were also there?

A. That's right.

Q. And you were not regularly placed at that area?

A. That is true.

Q. You were not at that time regularly assigned a traffic officer?

A. I was.

Q. You were temporarily as a utility man?

A. For that shift.

Q. For that particular shift? Do you have any idea or knowledge of who else was on that corner at that time?

A. I do not.

Q. No other police officer?

A. There were two officers across the street.

Q. Where across the street?

A. Diagonally across the street on the southeast corner.

Q. This corner here? Did they assist you in arresting the Defendant Reverend Shuttlesworth?

A. They did not.

Q. Did they help you to call the police car?

A. One of the officers called the patrol car, I believe.

Q. How many officers were present when you put him in the car?

A. I would say six or maybe seven.

Q. Six officers? Did he give you any trouble?

A. No trouble.

Q. Did he resist arrest?

A. No resistance.

Q. Officer Byars, this was on Wednesday morning, was it not?

A. I believe that's right.

Q. Is traffic pretty heavy on Wednesday morning on that street ordinarily?

[fol. 32] A. What type traffic?

Q. Foot traffic and pedestrian traffic.

A. I don't know what you consider heavy is. I am unable to answer the question.

Q. Well, in your best judgment tell us about how many people pass that corner going any way per given minute at about 10:30 in the morning.

A. It would vary.

Q. At that time on April 4th at about 10:30 in the morning in the year 1962 how many persons in your best judgment passed that corner per minute?

A. In all four directions?

Q. Any way, north, south, east and west.

A. Seventy-five to one hundred.

Q. Per minute?

A. Per minute. At this particular time.

Q. 10:30 in the morning.

A. At that particular minute I was there I would say seventy-five to one hundred.

Q. How long had you been there?

A. I had been at the next corner since 10:00 o'clock.

Q. But that was your first time coming to this particular intersection?

A. That's right.

Q. At that time in your best judgment the foot traffic, the pedestrian traffic, at 2nd Avenue and 19th Street in the City of Birmingham, Alabama, was seventy-five to one hundred persons per minute?

A. On all four corners.

Q. On all four corners?

A. Yes, sir.

Q. About seventy-five to one hundred per minute?

A. That is my estimate and judgment.

Q. What is your best judgment as to the traffic east and west?

A. Per minute?

[fol. 33] Q. Yes, sir.

A. About fifty people.

Q. About fifty people? Would you say it would be equally divided, twenty-five going east and twenty-five going west, or would you say more goes east or more goes west?

A. I have no way of knowing and have no idea.

Q. And you would say about the same north and south?

A. Again, I have no idea. They could go each way.

Q. By the same I mean the same number. You said fifty east and west and fifty north and south?

A. I would think so.

Q. When you first approached the Defendant Shuttlesworth and Defendant Phifer you came from inside Newberry's Department Store, did you not?

A. That is true.

Q. When you came to that corner did you address yourself to these defendants or to just the crowd?

A. I addressed myself to the people who were standing and not moving at that time.

Q. Did you address them from the front or from the rear?

A. From the front.

Q. You got in front of them?

A. Most of them I would say I was in front of them.

Q. Were they near the curbline on 2nd Avenue at the time you talked to them?

A. You mean the crowd or the defendants?

Q. The defendants.

A. They were between the store and the curbline.

Q. Now, would you say that was about—that was no longer than two minutes after you had seen them at the alley on 19th Street, assuming it took you forty-five minutes to get to the front of the store and a minute and a half while you observed them, you would say about two minutes or two and one-half minutes?

A. Didn't take forty-five minutes; it took forty-five seconds.

Q. I am sorry. Forty-five seconds from the time you first [fol. 34] saw them north of the alley and you went into Newberry's and proceeded to the front of the store and it took about forty-five seconds and you watched them for about a minute or minute and a half, and between the time they passed you there about the alley and the time you arrested the defendant on 2nd Avenue and 19th Street was about two minute, is that correct?

A. About four and one-half minute.

Q. How do you account for that time?

A. Because I spent a minute or minute and a half talking to them outside trying to encourage them to move.

Q. So, you would say it was about two minutes from the time you saw them crossing the alley on 19th Street until you first accosted the defendant, is that right?

A. About two or two and one-half minutes.

Q. Then you spent another minute talking to them and placing them under arrest?

A. In my best judgment

Q. Let's proceed from there, Officer Byars. You arrested the Defendant Shuttlesworth, you took him to 19th Street, the west side of 19th Street, and you called the patrol car; then the Defendant Phifer came up. Did he come up in an-

swer to a request from the Defendant Shuttlesworth, or did he voluntarily come up?

A. I don't know.

Q. Did you see Defendant Shuttlesworth ask him to do something or request something of him? You don't know what the conversation was?

A. All I know is Phifer of his own volition walked up and began to talk.

Q. Now, you arrested him at that time?

A. After I had asked him to move some three times.

Q. To move away from the Defendant Shuttlesworth?

A. Yes.

Q. This was where, now, on the west side of 19th Street?

A. Just north of 2nd Avenue.

[fol. 35] Q. Just north of 2nd Avenue, and this is where you had the Defendant Shuttlesworth waiting on the patrol car?

A. That is true.

Q. You were not standing in a cross walk at that point, were you?

A. No, not any of us at that particular time were in a cross walk.

Q. Defendant Phifer didn't block any sidewalk or anything then, did he?

A. Not then.

Q. Now, you didn't arrest the Defendant Phifer for blocking the sidewalk down on 2nd Avenue and 19th Street, did you?

A. I was occupied with Shuttlesworth and when I arrested him Phifer was with him, but at the time I was trying to pursue Shuttlesworth into the store Phifer disappeared.

Q. You wanted Shuttlesworth?

A. And I wanted Phifer.

Q. But you didn't arrest Phifer?

A. I couldn't arrest Phifer for chasing Shuttlesworth.

Q. Did he run?

A. He moved quickly into the store.

Q. You told him to move on?

A. After he was arrested is when he moved on.

Q. Did the Reverend Phifer run off anywhere?

A. He disappeared.

Q. But he came back of his own volition?

A. That is true.

Q. Did you then inform him he was under arrest? You told him to go ahead and let Fred alone, didn't you?

A. Yes.

Q. And only after he insisted on talking to Reverend Shuttlesworth did you arrest him?

A. That's right.

Q. What did you arrest him for—for talking to Reverend Shuttlesworth?

[fol. 36] Mr. Walker: We object. The complaint speaks for itself, what he was arrested for.

Mr. Hall: We would like to know what the officer arrested him for, not what the City says he was arrested for.

The Court: Let him answer.

A. For violation of Section 1436(F) and Section 1231.

Q. We understand that is what the written document says that is what you arrested him for, but what did you arrest him for on that date?

A. That is what.

Q. What did he do?

A. Interfering with an officer, refusing to obey the lawful command of an officer, obstructing sidewalk so as to interfere with free passage of pedestrians.

Q. Was he obstructing the sidewalk there while you had Defendant Shuttlesworth in your custody?

A. He was not.

Q. That is when you arrested him after you told him to go ahead and leave the Defendant alone?

A. Yes, that is when I arrested him for violation of Section 1231.

Q. That is the only time you arrested him?

A. I arrested him for two violations.

Q. Had you arrested him before that time?

A. I didn't. I couldn't find him.

Q. You had not arrested him before that time?

A. I could not find him.

Q. When he came up didn't you tell him to go ahead and let that man alone?

A. I didn't tell him to go ahead and let that man alone; I informed him he could not talk with the Defendant.

Q. And when he didn't move on you arrested him?

A. For violation of 1231, general code.

Q. But you didn't arrest him until that time, did you, Officer Byars?

[fol. 37] A. I couldn't find him.

Q. Did you look for him?

A. I didn't have time to look for him. I was checking Shuttlesworth.

Q. Didn't you have six officers there to help you?

A. Not at that time. There wasn't six there when the arrest was made.

Q. Did you arrest anybody else?

A. No.

Q. There was some other persons with the defendants when they were arrested?

A. That is what they told me.

Q. You were standing there looking at them, weren't you?

A. That's right.

Q. You didn't arrest any of them, did you?

A. They obeyed.

Q. You didn't arrest any, did you?

A. They moved on. I didn't arrest any.

Q. Now, as I understand it, you said you saw ten or twelve persons standing near the corner of 2nd Avenue and 19th Street at the time you arrested these defendants. How many people were in the group you first saw up there by the alley with the defendants?

A. Four to six people.

Q. Now, were they all walking together?

A. I would say so generally.

Q. What do you mean generally?

A. Walking up the street like you and five other people would walk up the street.

Q. How did you identify these folks—because they were all colored?

A. I didn't especially attempt to identify them, I had no reason to; I just noticed them walking.

Q. Were they loosely walking, walking four abreast, or two by two or one by one?

[fol. 38] A. I don't recall any particular events or series in which they were walking.

Q. How did you ascertain they were together in a group?

A. I didn't attempt to ascertain they were together; I just said four to six people walking down the street.

Q. Four to six people walking down the street and not necessarily together?

A. They were together, but I don't know whether they were—

The Court: Intentionally together?

A. That's right, yes, sir.

Q. When you got to the intersection and found these ten or twelve persons in the group—what do you mean by ten or twelve in a group?

A. That means like five and five are ten and two more is twelve.

Q. How did you ascertain they were altogether?

A. They were all standing and not moving.

Q. Was the light against them?

A. I am not aware of what the color of the light was at the time they were standing, but it changed some number of times while they were remaining in a stationary position.

Q. Are you certain of that?

A. I am quite certain.

Q. Were all these group colored people or some white and some colored?

A. I don't know what color they were.

Q. It is possible it just might have been the ten or twelve persons you were speaking of were probably other members of this pedestrian traffic moving along north, south, east and west?

A. They were standing and not moving.

Q. At some time, Officer Byars, isn't it true all pedestrians stand at intersections?

A. Necessarily to wait on the light to change.

Q. For various reasons?

A. For four and one-half minutes?

[fol. 39] Q. I don't know whether you stand there four and one-half minutes. As I understood you, it took some time to get to that corner. You have said it took—your whole operation took four and one-half minutes—they had to get from the alley too.

A. It was forty-five seconds.

Q. Maybe they can't walk that fast.

A. They were there when I got there.

Mr. Walker: We object to arguing with the witness.

Mr. Hall: This is cross examination, Your Honor, and the witness is arguing with me.

Q. Isn't it true, sir, all pedestrians stand at intersections sometime or another?

A. I don't know what other people do.

Q. You are a traffic officer.

A. They stand and wait on the lights.

Q. So, this ten or twelve people, you don't know whether they were acting in concert or whether these defendants were a part of them or what, do you?

A. Only what they told me.

Q. But you did race from the alley to the front of Newberry's and rush out there and arrest the Defendant Shuttlesworth and when Defendant Phifer sought to talk to him you put him under arrest?

A. Walked casually from the alley to the front, no particular expediency, and there watched the traffic outside.

Mr. Hall: If Your Honor please, we are through with this witness.

We would like to move, if possible, that the Reporter be asked to copy our diagram and include it in the record. We would like to introduce it if there is no objection.

Mr. Walker: No objection.

(Whereupon the blackboard diagram was received in evidence and marked "Defendant's Exhibit 1," a true and correct sketch of the same was made by the Reporter, and the Court Reporter hereby certifies that the reproduction of the same in this transcript is difficult or impracticable, [fol. 40] which fact is hereby certified to the Clerk of this Court.)

Redirect examination.

By Mr. Walker:

Q. I would like to ask one or two questions.

The X where you say marks the spot where the group was standing—

A. I believe that is where counsel asked me to designate Defendant Shuttlesworth's position.

Q. Was he alone or with some people?

A. There were some ten or twelve other people standing there with him.

Q. What was this group doing, if anything?

A. Just standing and talking.

Q. Who were they talking to?

A. Mostly to the Defendant Shuttlesworth.

Q. Was the Defendant Shuttlesworth doing any talking?

A. Quite a bit.

Q. Did any of the others talk to the Defendant Shuttlesworth?

A. They were all trying to.

Q. Now, you say, I believe, that you first saw the Defendant back here at the north end of Newberry's at the alley?

A. Yes, sir.

Q. And there were four or five people in the group with the Defendant at that time?

A. Yes, sir.

Q. And how many people was in this group that was talking in front of Newberry's?

A. In my judgment, ten or twelve.

Q. There were more than you had observed walking down 19th Street?

A. Yes, sir.

Q. Do you know where the additional people in that group came from?

A. No, sir. I was inside the store when they all gathered.

Q. Where did the people step off the curb at that you [fol. 41] testified about earlier?

A. On the west side of the telephone booth. It is the large spot drawn there.

Q. In other words, they stepped off onto 2nd Avenue?

A. Yes, sir.

Q. And when you say they stepped off the curb that means into the street as opposed to the sidewalk?

A. Into the street.

Mr. Walker: I believe that is all.

Mr. Hall: That is all.

(Witness excused.)

The Court: The hour being what it is, do you want to begin with a new witness or not?

Mr. Walker: We are willing to recess, Your Honor.

The Court: All right. 2:00 o'clock all right?

Mr. Walker: That is fine.

Mr. Hall: Yes, sir.

(Whereupon at 12:25 P.M. the court was in recess until 2:00 o'clock P.M.)

Officer James P. Renshaw, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name, please.

A. James Paul Renshaw.

Q. What is your occupation?

A. Police patrolman, City of Birmingham.

Q. How long have you been so employed?

A. A little over thirteen years. Be fourteen years next month.

Q. Now, do you know the defendants in this case, Fred Shuttlesworth and James Phifer?

A. Yes, I do.

Q. Did you know the defendants when you saw them prior to April 4, 1962?

A. I knew Shuttlesworth. I didn't know the other defendant.

[fol. 42] Q. Now, on April 4th of this year did you have an occasion to see these defendants?

A. I did.

Q. About what time did you see the Defendant?

A. Approximately 10:30 in the morning.

Q. Where were you at that time?

A. I was going south on 19th Street from 3rd Avenue to 2nd Avenue.

Q. You were between 3rd and 2nd on 19th?

A. That is correct.

Q. Where were the defendants when you saw them?

A. They were over by Newberry's. That would be on the northwest corner of that intersection.

Q. If it helps any, I might turn this blackboard so you can see it. Can you see that to help you with your directions?

A. Yes, sir.

Q. Where did you say the defendants were?

A. On the northwest corner.

Q. Was anyone with the defendants or were they alone?

A. There were eight or ten or twelve.

Q. And what were the defendants and this group of people doing at that time?

A. They were looking at Officer Byars.

Q. Where was the Defendant James Phifer? Do you recall?

A. I don't recall at that particular time.

Q. Do you recall where the Defendant Fred Shuttlesworth was at that time?

A. I believe he was about in the middle of the crowd. I can't be positive on that.

Mr. Hall: If Your Honor please, we object to that answer and move it be stricken.

The Court: Well, whatever his best judgment about the location is might be sufficient.

Q. What did you do, if anything, when you saw Officer [fol. 43] Byars in this group of people?

A. I got off my motorcycle and went over to the scene.

Q. Was the crowd still there when you got there?

A. The crowd was still there when I got there.

Q. Tell the Court what, if anything, happened after you arrived at the scene?

A. I heard Officer Byars tell this group of men, "This is the third and last time I am telling you to move, you will have to clear the sidewalk," or words to that effect.

Q. About how big an area of the sidewalk did this group of men have covered? In other words, their bodies covered what portion of the sidewalk in your best judgment?

A. I would say about half.

Q. What happened, if anything, when Officer Byars told them this was the third and last time he was telling them to move on? What happened then?

A. The Defendant Shuttlesworth said, "We are just standing here on the sidewalk." And Officer Byars told him he was under arrest, and he said, "We will go in the store then." And he proceeded to go in the store and Officer Byars caught him and placed him under arrest.

Q. Did you see the Defendant Phifer at the time Reverend Shuttlesworth was placed under arrest?

A. Not to know him I didn't.

Q. Did you ever see him again?

A. I saw him a minute or so later.

Q. What were the circumstances that you saw the Defendant Phifer a minute or so later?

A. We had taken the Defendant Shuttlesworth over to a motorcycle over close to the motorcycle by a mail box located there at the corner, and the Defendant Phifer came

up and started talking to Shuttlesworth. At that time Officer Byars told him he would have to leave, he couldn't talk to a prisoner.

Q. What happened then?

A. He said, "I am going to talk to him."

[fol. 44] Q. Was there any more conversation after that?

A. I don't recall if Officer Byars told him another time he would have to leave, that he was not allowed to talk to a prisoner, or not, and Defendant Phifer said he would just go with him, and he was placed under arrest.

Q. Was the Defendant Phifer placed under arrest at that time?

A. Yes, sir.

Q. Let me ask you this: When you first saw this group of people they were standing just outside of Newberry's at the corner where Newberry's is located?

A. They were standing at the curb on the 2nd Avenue side at the cross walk that crosses over 2nd Avenue to Pizitz.

Mr. Walker: I believe that is all.

Cross examination.

By Mr. Hall:

Q. Officer Renshaw, are you a traffic policeman?

A. That is correct.

Q. Still in traffic?

A. Still in traffic.

Q. On this morning where were you patrolling, the morning of April 4, 1962?

A. I was patrolling 19th Street. I work 18th and 19th Street.

Q. Patrolling 19th Street? What was your job?

A. All traffic enforcement.

Q. Was there a heavy concentration of policemen on these streets on April 4, 1962?

A. To my knowledge there was not.

Q. Officer Byars was there on 19th Street I understand?

A. He works the corner. I work a motorcycle.

Q. What did Officer Byars work on that day?

A. He worked an intersection.

Q. Which intersection?

A. I don't know which corner he was working on on that day.

Q. But there wasn't any particular heavy concentration of policemen down there at that time, was there?

[fol. 45] A. There was no concentration of policemen.

Q. More so than usual?

A. Some might have been passing.

Q. What time do you change your shifts?

A. We don't have a shift. We go on at 10:00. We are kind of a split shift.

Q. Go on at 10:00 o'clock in the morning?

A. 10:00 o'clock in the morning.

Q. At that time you would be going through your various assignments and you were just coming on duty?

A. We had just come on about thirty minutes before.

Q. That was about 10:30?

A. That is correct.

Q. How many policemen did you see at or about the corner of 2nd Avenue and 19th Street on the morning of April 4, 1962, at about 10:30?

A. Now, the only one I saw at this particular time—of course, in just a minute more came over, but when I first arrived the only one I saw was Officer Byars.

Q. In a minute you say more came over?

A. That's right.

Q. Could you ascertain where they came from?

A. I couldn't tell. I didn't see them until they arrived there.

Q. Officer, were you aware on that date, that is, April 4, 1962 that the Negroes of the City of Birmingham were engaged in a selective buying campaign with reference to the stores downtown?

A. I had heard of it.

Q. Do you know if the Police Department officially knew of this selective buying campaign at that time?

A. I can't say about officially, if they officially knew of it.

Q. Had you gotten any official word of this selective buying campaign at that time?

A. Do you mean any official orders?

Q. Any instructions from your superiors or your depart-
[fol. 46] ment about the buying campaign?

A. None that I recall.

Q. You had not been instructed to patrol the streets very carefully and attempt to ascertain who, if anyone, was carrying on this campaign?

A. We had not been told of it.

Q. You had not been instructed to keep out particular watch for certain persons who might appear in town?

A. We had not been told to watch for anyone.

Q. The Police Department didn't have special officers in ordinary clothes stationed in Newberry's and Loveman's Department Store and Pizitz Department Store?

A. That is possible. I didn't go in the stores. I don't know.

Q. Did you see any special officers?

A. I did not see any special officers.

Q. You do not know of any such officers who were stationed there for the particular reason that they were trying to police upon this selective buying campaign?

A. Not to my knowledge.

Q. Have you seen any mimeographed leaflets circulated about town with reference to the selective buying campaign urging Negroes to be careful where they shopped during the Easter season?

A. I had seen them.

Q. Had you seen them on April 4, 1962?

A. Whether before or after I don't recall.

Q. But this particular incident occurred right at the time when the selective buying campaign was going on, did it not?

A. It was about that time.

Q. Now, Officer, you are a veteran policeman. I will ask you how long you have known the Defendant Shuttlesworth?

A. I believe the first time I saw him was up at the terminal station when we had a little trouble up there two or three years ago.

Q. What sort of trouble was that?

[fol. 47] A. He was sitting in the white waiting room up there.

Q. In the waiting room reserved for white people?

A. That's right.

Q. Did you arrest him on that occasion?

A. I did not.

Q. Was he arrested on that occasion?

A. Not while I was there.

Q. Had you seen him after that and before April 4, 1962?

A. I don't recall right offhand whether I did or not.

Q. I will ask you, Officer, if you were on duty at any time during the so-called freedom rights at the Trailway Bus Station or Greyhound Bus Station?

A. I was.

Q. Were you present at the Greyhound Bus Station on the occasion when Fred Shuttlesworth was arrested there?

A. That's right, I sure was.

Q. Did you testify against him at his trial?

A. I don't remember.

Q. But you were one of the officers present?

A. I was present. In fact, I am sure I didn't arrest him.

Q. You do know he was arrested at Greyhound Bus Station on that occasion?

A. I believe he was.

Q. And charged with failure to obey the lawful commands of Police Chief Jamie Moore, you know that, do you not?

A. Yes.

Q. And you know he was subsequently tried on that charge?

A. Yes.

Q. And numerous members of the Birmingham Police Department testified against him, did they not?

A. Yes.

Q. And you knew that on April 4, 1962, didn't you?

A. Yes, I knew it.

Q. Officer Renshaw, I will ask you if you did not know that [fol. 48] the Defendant Shuttlesworth and Phifer were arrested as the result of an experience on the Birmingham Transit buses sometime early in 1962?

Mr. Walker: We object. He couldn't know why the defendants were arrested.

The Court: Well, if it goes to the length of recognition or knowledge of them, I guess it is all right.

A. I recall, but at that time I don't know whether I recognized him as being Shuttlesworth or not. I know there was a busload, but whether or not I ever saw him I don't recall.

Q. I will ask you this, Officer Renshaw: You were aware of the fact that Reverend Shuttlesworth and the Reverend Phifer were arrested early in 1962 when it was alleged that their time for appeal had expired and that they were incarcerated in the Birmingham City Jail for more than a period of one month and were subsequently released as a result of an appeal to the United States Supreme Court—were you aware of that fact?

A. I was.

Q. You knew that on April 4, 1962?

A. I did.

Q. As a matter of fact, these defendants were and are fairly notorious persons in the field of civil rights in the City of Birmingham, are they not?

A. Yes.

Q. They have been for some time, have they not?

A. That's right.

Q. They have been arrested on numerous occasions in and about their efforts in the field of civil rights?

A. That's right.

Q. Their faces have appeared on numerous television shows and in the newspapers on many occasions, is that right?

A. That is correct.

Q. They are generally known to the Birmingham Police Department?

A. To the ones who have seen them I would say they are.

[fol. 49] Q. They were so generally known on April 4, 1962, is that right?

A. To me they were.

Q. Now, Officer Renshaw, where did you say you were when you first observed these two defendants here on the morning in question?

A. I was going south on 19th Street.

Q. Will you indicate that on the board here that we have drawn, please, sir?

A. I was going south in this direction to about this point. (Indicating)

Q. About there? Now, where did you observe these defendants when you reached this point?

A. They were along in this position here. (Indicating)

Q. Would you tell us your best judgment how many feet you were from 2nd Avenue?

A. I was in the curb lane, which is the right lane, and I would say I was ten or twelve feet from the curb and when I first observed them I would say I was roughly twenty or thirty feet north of 2nd Avenue.

Q. Twenty or thirty feet north of 2nd Avenue?

A. Yes.

Q. You didn't see them prior to that time?

A. No.

Q. You didn't see them proceed down 19th Street?

A. No.

Q. Had you seen Officer Byars prior to that time?

A. No, I had not.

Q. When did you first see Officer Byars?

A. When he was talking to them.

Q. When you approached this corner and arrived at the point you have indicated on the board here Officer Byars was then on the curb talking to the defendants?

A. That is true.

Q. What did you do when you saw Officer Byars standing over there talking to them?

A. I got off my motorcycle and walked over there.

[fol. 50] Q. You walked over to the crowd?

A. Yes.

Q. Did you join Officer Byars?

A. Not in the conversation.

Q. But he knew you were there?

A. Whether or not he did—when I got off the motor he had his back to me.

Q. Did you go to him and inquire as to whether or not he was having difficulty, or what did you do?

A. Well, he was talking and I didn't interrupt his conversation.

Q. You just stood there?

A. I just stood there.

Q. And listened to what he said?

A. Yes.

Q. And listened to what the defendant said?

A. Yes.

Q. Did you recognize the defendants when you looked at them?

A. Which one?

Q. Both of these defendants.

A. I recognized one of them.

Q. Which one did you recognize?

A. Shuttlesworth.

Q. Did you assist Officer Byars in arresting the Defendant Shuttlesworth?

A. That is true, I did.

Q. You did assist him?

A. That's right.

Q. How did you assist him?

A. Just by my presence. I would say that. As far as using force, it wasn't necessary.

Q. I am a little curious, Officer; did Officer Byars ever turn around and note your presence?

A. I don't believe he knew I was there until I got up to him.

Q. So, when he testified here, or if he did, that no other officer was present, he was probably correct, is that correct?

[fol. 51] A. That is correct.

Q. As a matter of fact, he didn't know you were there himself?

A. Not unless he heard my motor coming up he didn't.

Q. But if he said there was no other officer there, he is not in error because he didn't see you?

A. Not until the last he didn't see me.

Q. You had nothing at all to say to the defendants?

A. No, I did not.

Q. How many times did you hear Officer Byars repeat that they were to move on?

A. I just heard him that one time.

Q. What did he say?

A. First I heard him in a loud voice, but I couldn't distinguish what he said, but then he said, "For the third and last time I am telling you you got to clear the sidewalk, that you got to move on," or words to that effect.

Q. To whom was he addressing his remarks?

A. To the crowd.

Q. The entire crowd?

A. Yes.

Q. Was the crowd just standing there and looking at him?

A. Just standing there and looking at him.

Q. What did they do after that third statement?

A. Shuttlesworth said, "We will just go in the store."

Q. "We will just go in the store"?

A. Yes.

Q. Tell me about this crowd, how many people were in that crowd?

A. I believe I said eight or ten or twelve.

Q. Were they all colored or any white folks or Chinese or Japs?

A. In this one crowd they were all colored.

Q. No white folks there at that corner at all?

A. There were people on the corner and people crossing the street.

Q. Were there any standing up there?

[fol. 52] A. Clarify that a little.

Q. I am trying to find out when you refer to crowd to whom are you referring?

A. I am referring to a bunch of men that were standing at one location.

Q. Which location?

A. In the location I pointed out this group of men were standing in.

Q. Would you mind pointing it out again? You pointed out where the two defendants were standing.

A. Now, the whole group was here. (Indicating.) I see you have the crosswalk drawn across. The whole group had the crosswalk approximately half blocked.

Q. You say whole group, you mean all the colored folks present?

A. They were standing and listening to Officer Byars.

Q. And you had all the colored folks grouped in one group?

A. I did not. I said all in this one group you are speaking of.

Q. What held them together and distinguished them for you?

A. They were just close and each one watching Officer Byars.

Q. Weren't other folks watching him too?

A. If they were they were somewhere else, but they were not immediately in front of him.

Q. Officer Byars was not immediately in front of them?

A. Or vice versa.

Q. Where was Officer Byars standing, was he standing immediately in front of any particular individual?

A. In front of this group you were talking about. He was standing in front of them.

Q. With reference to these two defendants where was he standing?

A. He was standing north of the two defendants and maybe a little northeast.

Q. Was he directly in front of either of these defendants?

A. I couldn't say for sure if he was directly in front of either one of the two defendants.

[fol. 53] Q. You don't know now—the crowd standing right there and you moved from twenty-five feet here to what portion of that crowd—where were you, outside the crowd, in front of it, or where?

A. In front of it.

Q. On this side?

A. I was just a little east of Officer Byars.

Q. Over this way?

A. Yes.

Q. You were out in the crosswalk over here?

A. Yes.

Q. And Officer Byars was at the front of you and to the west you say?

A. That's right.

Q. He was in front of you?

A. Yes.

Q. And you were behind him?

A. Yes.

Q. How close were you to Officer Byars?

A. When I first walked up or at what time?

Q. When you first walked up. How long did this arrest take?

A. Just a few seconds, I would say.

Q. How many seconds?

A. Within thirty seconds from the time I got there.

Q. How close were you to Officer Byars during any one of those thirty seconds?

A. I would say I was within two or three feet of them.

Q. How close were you to Defendant Shuttlesworth during that time?

A. Just add two or three feet to that. Five or six feet.

Q. Were there any persons between you and the Defendant Shuttlesworth?

A. I would say none other than Officer Byars.

Q. But he was in bold relief—you could see him?

A. I could see him to recognize him.

[fol. 54] Q. There were no persons between you—there were a crowd of people there all right, but there was no persons between you and Shuttlesworth?

A. I am talking about the crowd in particular. I don't recall if he was in the center of the crowd or on the edge, but I kind of believe he was in the center.

Q. You could see him distinctly?

A. I said a hazy recollection, but I believe he was in the center of the crowd and I would be about five feet from him in that case.

Q. This is what I am trying to get at, Officer Renshaw: You testified as to what this defendant said and what Officer Byars said and there seemed to be no difficulty about that, but what I was trying to see is how close you were to him or if there was someone between you and if somebody else might have said it.

A. No, because I recall looking right at him when he said it.

Q. And you also know what Officer Byars said?

A. Yes, that's right. I heard the last statement.

Q. When did Defendant Shuttlesworth decide to go in the store?

A. When did he decide to go in the store?

Q. Yes. Were you there when he went in?

A. I was there when he started in after Officer Byars told him he was under arrest.

Q. And you distinctly heard that of course, but how far in did he get into the store?

A. I would say almost to the door.

Q. Was he walking fast or running?

A. Just walked off with the rest of the crowd.

Q. With the rest of what?

A. The group.

Q. All of them walked off into the store?

A. Yes.

Q. Had any of that group you are testifying about walked away prior to this time?

A. It is possible some could have walked away. The short [fol. 55] time I was there I don't recall.

Q. Do you recall the Defendant Phifer walking away?

A. I don't recall. I didn't know him when I see him.

Q. Do you recall any of those colored folks walking away?

A. I don't recall it. Like I say, it is possible they could have.

Q. When the group went into Newberry's or turned to go into Newberry's, was the entire group arrested?

A. Just one.

Q. The Defendant Shuttlesworth?

A. That's right.

Q. Defendant Phifer was not arrested at that time, was he?

A. He was not.

Q. Were you present when he was arrested?

A. I was.

Q. Where did that take place?

A. Would you like me to draw it?

Q. Yes, sir.

A. It was about in this location here. (Indicating)

Q. About how many feet would you say that is from the south curb of 19th Street—rather, the north curb of 19th Street and 2nd Avenue?

A. The north curb of 2nd Avenue I would say would be twelve to fifteen feet.

Q. So, the Defendant Shuttlesworth was taken to a point about twelve or fifteen feet from the north curb of 2nd Avenue on 19th Street, is that right?

A. That's right.

Q. And he was made to stay there and stand there while the officer called the police?

A. That's right.

Q. Were you still present during this time?

A. I was.

Q. Did you have your motorcycle or vehicle with you?

[fol. 56] A. I did.

Q. Does it have a two-way radio?

A. Yes, it did.

Q. Did you call the patrol car?

A. I believe one of the other officers called the patrol car maybe on my radio.

Q. Which other officer was this?

A. One of the other officers that was there.

Q. How many officers were there in these thirty seconds you are talking about?

A. Now, we have gotten a little—when we were standing over here and you said we called the police on the two-way radio, there were four or five officers there at that time.

Q. Was it more than thirty seconds? How long had this whole operation taken?

A. The whole operation I would say took ten or fifteen minutes.

Q. Had it taken that long?

A. Yes, that's right.

Q. And there were four or five other officers present and they used your two-way radio?

A. I would imagine that they used mine.

Q. And you were standing there with Officer Byars near Defendant Shuttlesworth?

A. That's right.

Q. When the Defendant Phifer came up to talk with him?

A. That is correct.

Q. Do you recall the circumstances of his coming up to talk? Do you know whether it was the result of being called?

A. You mean if Shuttlesworth called Phifer over or not?

Q. Yes.

A. I don't know.

Q. You didn't hear that? How close were you to them at this point?

A. I could have been within six feet.

[fol. 57] Q. Now, did you say anything to either one of these defendants at that point?

A. No, I didn't.

Q. What did Officer Byars say to the Defendant Phifer there?

A. He told him this man was under arrest and he would not be allowed to talk to him and to move on.

Q. He said point blank that he would not be allowed to talk to him, is that right?

A. He said, "You cannot talk to the prisoner," or words to that effect.

Q. Said he was under arrest in violation of a city ordinance and he could not talk to him?

A. That's right.

Q. And he told him to move on?

A. That's right.

Q. Did Defendant Phifer move on?

A. He said, "I will go with him."

Q. Did he move?

A. He did not.

Q. What did Officer Byars say then?

A. He said, "You are under arrest too."

Q. What did he tell him he was under arrest for?

A. Refusing to obey the lawful command of an officer.

Q. How many policemen were standing there with you at that time?

A. At that time I would say there were four or five.

Q. At least four or five?

A. Yes.

Q. And there were just these two defendants?

A. That's right.

Q. The arrest of the first defendant, F. L. Shuttlesworth, had been for failure to clear the street?

A. That's right.

Q. Had he been searched?

A. I don't believe he had at that time, or up until that time I would say.

[fol. 58] Q. Was he a docile prisoner?

A. He was.

Q. Did he give you any difficulty at all?

A. No.

Q. Did the Reverend Phifer, the second defendant, offer any physical exertions on behalf of the first prisoner?

A. None.

Q. Did he resist arrest himself?

A. He did not.

Q. Did he make any threats or any attempt to relieve the first prisoner or himself?

A. He did not.

Q. Are these the only two persons in that crowd who were arrested?

A. Yes.

Q. What happened to the crowd after they were arrested?

A. They disbursed and the four or five officers that were there kept moving people up and down the street and not letting them block the street.

Q. After the arrest the crowd got bigger?

A. It did.

Q. As a matter of fact, the arrest itself obstructed traffic for some time, did it not?

A. Like I said, when we went over to wait for the wagon or car there was a mail box there and a light pole; we were by the mail box and the light pole and of course naturally you would obstruct anyone that walked through there.

Q. Officer Renshaw, how long had you been on this traffic beat before April 4, 1962—how many weeks or months?

A. You mean working 19th Street and 18th Street?

Q. Yes.

A. I would say two and one-half or three years.

Q. Are you familiar with the flow of traffic at 2nd Avenue and 19th Street?

A. I am.

[fol. 59] Q. Do you know the opening times of the various stores located along 19th Street at 2nd Avenue?

A. Normally I know the bigger stores.

Q. The Newberry's Store opens at what time?

A. I believe Newberry's opens about 9:30. Most of them open at 10:00.

Q. Now, on the southwest corner is Pizitz Department Store, is that correct?

A. That is correct.

Q. That is the southwest corner of 19th Street and 2nd Avenue intersection?

A. That is correct.

Q. And they are open about what time?

A. They open about 10:00.

Q. Are there other department stores along 19th Street at about that intersection?

A. There is department stores. You got your Green—no, that is 2nd Avenue. You mean how close to the intersection?

Q. Well, let's rephrase that. There are other stores selling merchandise, various stores, that is correct, isn't it?

A. That is correct.

Q. And what is the general time that they open in April ordinarily?

A. I would say anywhere from 9:00 to 10:00.

Q. The larger stores open at 10:00, is that correct?

A. Yes.

Q. And the banks open at what time?

A. 9:00.

Q. 9:00 or 9:30?

A. Yes, sir.

Q. And there were no banks on 19th Street at that time?

A. None at that time.

Q. Only the stores, the department stores and merchandise stores, is that correct?

A. That is correct.

[fol. 60] Q. And this did occur on Wednesday, did it not?

A. I don't recall what day of the week it was.

Q. Assuming it was Wednesday for the purpose of this question at about 10:30 in the morning during the first week of April in any year, particularly this year, what in your best judgment would be the flow per minute of pedestrians north or south, east or west at that intersection?

A. I couldn't answer that—you mean normal flow of traffic walking north or walking south or walking east or walking west?

Q. Yes, per minute at about 10:30 on Wednesday morning in the first week of April under normal conditions.

A. I have never given it any thought. I would say it would be at least one hundred per minute walking in any direction. That might be a little high.

Q. Does it increase or decrease as the time goes on? That is, when is the busiest time at that intersection?

A. Around noon.

Q. What in your opinion would you say the flow per minute was?

A. It would increase I would say fifty per minute.

Q. It wouldn't increase by fifty per minute from the very beginning of the early morning shopping time to high noon

when employees and other persons moving about to get their lunch and come back in the store to go about their various chores?

A. About fifty per minute.

Q. And that is your best judgment?

A. That is my best judgment.

Mr. Hall: Thank you. That is all.

Redirect examination.

By Mr. Walker:

Q. Officer Renshaw, let me ask you one or two questions. When you first saw this group were you able, or did you know whether or not the Defendant Phifer was in it?

A. I do not.

Q. Did you ascertain at any time after coming up on the corner whether the Defendant Phifer was in this group?

[fol. 61] A. I don't know the defendant and didn't know him until the last instance where he was placed under arrest.

Q. One other thing. I would like to clear up on this diagram this part next to the curb on the northwest corner, that is, the line you drew indicating where the group was standing when you first saw Officer Byars talking to them.

A. That is correct.

Mr. Walker: That is all.

Mr. Hall: We have no further questions.

(Witness excused.)

Officer C. W. HALLMAN, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name, please.

A. Officer C. W. Hallman, City of Birmingham.

Q. And you are a policeman?

A. Traffic policeman.

Q. How long have you been a police officer?

A. Be twelve years next April.

Q. How long have you worked the traffic detail?

A. Four years.

Q. On April 4th this year were you working traffic?

A. Yes.

Q. Where were you working on April 4th?

A. 2nd Avenue and 19th Street North.

Q. On that occasion did you see either of these defendants at about 10:30 in the morning on April 4th?

A. Yes, sir.

Q. Where did you first see either or both of the defendants?

A. On the northwest corner of 2nd Avenue and 19th Street.

Q. What were they doing at the time you saw them?

A. At the time I first saw them they were standing—these two defendants were standing with about five or six more [fol. 62] with them in kind of a group and Officer Byars was talking to them.

Q. Did you see both defendants in the group?

A. Yes, sir.

Q. What did you do then, if anything?

A. At that time I didn't do anything. I was getting some information from another officer on the southeast corner of the intersection.

Q. Was that in relation to this case?

A. No, sir. It was to call my home.

Q. What did you see happen on the northwest corner, if anything, on that occasion?

A. I noticed Officer Byars talking to the group and directly he motioned for me and Officer Davis to come over there where he was at, and we went over there and just as I stepped up on the curb I heard him tell this group, "I am telling you for the third time you will have to move on, you are blocking the crosswalk."

Q. About how many was in the group at that time, if you know?

A. I would say five or six. It could have been more or less.

Q. What happened to the group then, if anything?

A. All of them disbursed except Shuttlesworth.

Q. What happened after that?

A. Officer Byars told him he was under arrest for blocking the sidewalk and placed him under arrest.

Q. Where were you standing at the time you were hearing this conversation?

A. I was standing on the same corner they were, the northwest corner.

Q. What happened after the others had left and he told Reverend Shuttlesworth he would have to move on or he would arrest him? What happened then?

A. All of them moved except him and he placed him under arrest and carried him over to the edge of the curb to wait for the police car to come pick him up.

Q. Was the Defendant Phifer there at that time?

[fol. 63] A. He was there and moved on, but he came back.

Q. Did you see him when he came back?

A. Yes, sir. I would say I was standing on the north side of where Shuttlesworth was standing.

Q. What happened when the Defendant Phifer came back?

A. He came up and said he wanted to talk to Shuttlesworth and Officer Byars told him he couldn't, that he was under arrest, and he said, "Well, I want to talk to him anyway." And he said, "Well, if you do, I will have to arrest you too because I have told you to leave." And he said, "Well, I will have to be arrested." And he placed him under arrest for failing to obey an officer.

Mr. Walker: I believe that is all.

Cross examination.

By Mr. Hall:

Q. How do you spell your name, H-a-l-l-m-a-n?

A. That's right.

Q. Mr. Hallman, will you come up to this diagram and show us where you were standing, assuming this is 19th running from top to bottom, and 2nd Avenue from side

to side, this is the intersection here, this is Newberry's, this is Pizitz, that is the southeast corner and that is the northeast corner of the intersection. (Indicating.)

A. You want me to show you where I was standing when I first saw them?

Q. Yes.

A. I was standing right here. (Indicating.)

Q. Will you just print your name right there, please, sir?

A. (Indicating.)

Q. How long had you been standing there, Officer Hallman?

A. I had been there approximately an hour. I had been working traffic on that side of the street.

Q. You had been working this intersection for approximately an hour?

A. Yes.

[fol. 64] Q. When you first observed this business over here between Officer Byars and these defendants?

A. That's right.

Q. How many policemen ordinarily work that intersection, Officer Hallman?

A. Just one.

Q. But you had some help this morning?

A. No.

Q. How many policemen were on that corner at that time?

A. Well, at that time there were three of us. There was myself, Officer Davis was giving me information to call my home, and Officer Byars was standing on the other corner.

Q. Wasn't there another officer there?

A. I didn't see him at that time. I didn't notice him.

Q. Did you ever see him—Officer Renshaw?

A. Yes, I saw him.

Q. When did you see him?

A. Before the two defendants were placed under arrest.

Q. You didn't see him at the time the Officer Byars was giving his third command to Shuttlesworth and Phifer?

A. No, I was looking at Officer Byars. Only one time I heard him.

Q. You heard him say that just once?

A. Yes.

Q. He only said it once, is that right?

A. I couldn't verify that. I was across the street and I heard him say it once.

Q. From the other side of the street?

A. No. The side he was on.

Q. You were standing there near him when he said it?

A. When he said, "This is the third and last time I am telling you you have to move on."

Q. You didn't see Officer Renshaw standing there at that time?

A. I told you I didn't.

Q. But there were at least four officers on that intersection [fol. 65] at that time, is that correct?

A. Three.

Q. How long did it take to arrest these two defendants on that occasion?

A. I would say the whole procedure took approximately six or seven minutes counting the time they were arrested and the time for the car to get there and take them away.

Q. After they were arrested the car came and picked them up and took them away and didn't take over six or seven minutes?

A. Eight at the most.

Q. Now, you observe on these corners from your position here when you police that corner, do you not?

A. I try to.

Q. Had you seen these people over there blocking traffic before you saw Officer Byars?

A. I saw him standing over there talking to them.

Q. Did you see them before he was talking to them?

A. I saw them over there. I didn't pay any particular attention to them.

Q. Did you get the impression they were waiting for the light to change?

A. I couldn't answer that because I don't know what they had on their mind.

Q. You formed no impression when you first saw them?

A. No.

Q. You took no note of them when you first saw them, is that right?

A. Just saw them standing over there.

Q. The only time you made note of them standing over there was when you saw the policeman assisting you talking to them?

A. When I saw him over there talking to them. He wasn't assisting me.

Q. He wasn't assisting you with your corner.

A. No.

[fol. 66] Q. Officer Hallman, were you aware on that date that there was a selective buying campaign going on initiated by Negroes in the City of Birmingham against downtown stores?

A. I have no proof of such going on.

Q. Were you aware of it?

A. It had been rumored.

Q. You had some knowledge of it?

A. Rumors.

Q. Had you been told by your superior officers that such a thing was going on?

A. No.

Q. Had you seen any mimeographed copies of leaflets announcing there was a selective buying campaign going on?

A. Never had seen such.

Q. And advising Negroes to remain from the downtown area?

A. No.

Q. Isn't that the reason you had so many policemen on that corner?

A. No.

Q. Isn't it true the only reason Fred Shuttlesworth was arrested that day was because he was downtown and the police thought he might have been encouraging the selective buying campaign?

A. He was arrested for the charges placed against him and that is all.

Q. Did the Defendant Phifer request permission of the officer who had arrested the Defendant Shuttlesworth to speak to him?

A. He said he wanted to.

Q. He asked the officer?

A. That's right.

Q. And the officer said he couldn't?

A. The officer said he couldn't.

Q. He didn't walk up to the Reverend Shuttlesworth and start talking to him without asking the officer, did he?

A. He came up and said something to him and Officer Byars told him he couldn't talk to him, he was under arrest, and then he said, "I would like to talk to him." And he said, [fol. 67] "You can't, he is under arrest."

Q. Did he tell the Defendant Phifer to move on?

A. He told him to move. He said he wanted to talk to him anyway and he said, "I will have to place you in jail too."

Q. And that is when he arrested the Defendant Phifer?

A. That's right.

Q. He didn't arrest him on that corner?

A. He arrested him on that corner.

Q. I beg your pardon. I don't quite understand you. I said he didn't arrest him on the corner when he arrested Defendant Shuttlesworth?

A. He was arrested on the northwest corner of 2nd Avenue and 19th Street after he arrested Shuttlesworth.

Q. Will you show me where you were when he was arrested, please? I don't quite understand.

A. When Shuttlesworth was placed under arrest I was standing right here behind Officer Byars. When Phifer was placed under arrest Shuttlesworth was standing here and I was standing here and Byars was standing right here behind Shuttlesworth. (Indicating.)

Q. Now, how far in your best judgment was Officer Byars from the north curb of 2nd Avenue after he arrested Shuttlesworth?

A. About a car length.

Q. In your best judgment how far is that in feet?

A. About ten feet or twelve or something like that.

Q. That was ten or twelve feet from the point where he had arrested Reverend Shuttlesworth, is that correct?

A. I didn't say that. It was that far from the north curb line.

Q. In your best judgment how far was it from the point he arrested the Reverend Shuttlesworth?

A. I would say it would run across the corner this way would be about another eight or ten feet.

Q. So, it was eight or ten feet away and it was about five to ten minutes away in point of time, is that right?

A. I would say it would be about three or four minutes [fol. 68] from the time Shuttlesworth was arrested until Phifer was arrested.

Q. And he was arrested for wanting to talk to Reverend Shuttlesworth?

A. He was arrested for failing to move on when an officer told him to.

Q. But it was only after he attempted to talk to Reverend Shuttlesworth?

A. That's right.

Q. And the officer said he couldn't and told him to move on?

A. Yes.

Q. And then he was arrested?

A. That's right.

Q. But he was not arrested at the outset when Shuttlesworth was arrested for blocking that sidewalk?

A. No. He moved when he was told to because the sidewalk was being blocked.

Mr. Hall: Thank you very kindly.

The Court: Anything further?

Mr. Walker: No further questions.

(Witness excused.)

Mr. JOHN D. ALLRED, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. What is your full name?
A. John D. Allred.
Q. How do you spell it?
A. Allred.
Q. Officer Allred, your occupation is a policeman?
A. Yes, sir.
Q. How long have you been so employed?
A. Four years this past August.
Q. What are your assignments, traffic or—
A. Well, no, sir. I am in the patrol division.
Q. On April 4th of this year where were you working?
[fol. 69] A. I was working traffic downtown.
Q. Traffic was your assignment then?
A. Yes.
Q. On that occasion did you see either of the defendants or both of them?
A. Yes, sir, I did.
Q. About what time?
A. Approximately 10:30.
Q. Where were the defendants when you first saw them?
A. When I first saw the defendants they were talking to Officer Byars.
Q. Where were you at that time?
A. I would say I was approximately twenty-five or thirty feet south of the alley by Newberry's.
Q. And what did you do then, if anything?
A. Well, I was giving some directions to some people at this time and I heard Officer Byars make a statement to a group they were going to have to move on.
Q. How far were you from the group or from Officer Byars when you overheard that statement?
A. Approximately from here to the back of the court room.

Q. What happened then, if anything?

A. Well, as I say, I was giving directions and I saw Shuttlesworth and this other one walk off and then I saw Officer Byars go get them, and the next time I saw him he was leading one of them back to the curb.

Q. Were you present when the Defendant Phifer was placed under arrest?

A. Yes, sir.

Q. When was the Defendant Phifer placed under arrest?

A. He had Shuttlesworth standing at the curb and he came up and said he wanted to talk to him and Officer Byars told him he couldn't talk to him, he was under arrest.

Q. Did you ever come from where you were first standing [fol. 70] when you first saw the incident?

A. Yes, sir, I came on up there.

Q. You were present then when Phifer was placed under arrest?

A. Yes.

Q. What did Reverend Phifer say to Officer Byars and to Shuttlesworth and what did Office Byars say to Phifer?

A. Well, now, I don't know what he said to Shuttlesworth, but Officer Byars told him he couldn't speak to Shuttlesworth because he was under arrest, and to the best of my knowledge he kept on insisting and Officer Byars told him he would have to go with him, and he told him he wanted to with him, or something to that effect.

Mr. Walker: That is all.

Cross examination.

By Mr. Hall:

Q. Officer Allred, how long have you been with the police department, please, sir?

A. Four years this past August.

Q. Have you been in traffic all that time?

A. All but approximately a year.

Q. About a year in traffic?

A. All but a year.

Q. And you were in the traffic department on April 4th this year?

A. I was.

Q. Where were you stationed at that time?

A. I was working on the corner of 3rd Avenue and 20th Street at that time. That was my regular assignment.

Q. What was the occasion for you being on 2nd Avenue and 19th Street?

A. We just walk around most anywhere.

Q. Walk around? Is traffic that slow at that time of morning?

A. I won't say it is that slow, but when I was working 3rd and 20th I went most anywhere I wanted to in the downtown area.

Q. You could do that in comparative safety; there is no necessity then for policemen at those intersections?

A. Yes, there is a necessity.

[fol. 71] Q. What accounts for the fact you could walk around anywhere you wanted to and leave your particular post?

A. Well, I can't say. I was just walking around.

Q. You had no particular reason for being at 2nd and 19th?

A. No.

Q. You hadn't received any radio call from police headquarters?

A. No.

Q. No one told you Shuttlesworth was on 2nd and 19th?

A. No.

Q. You knew the Defendant Shuttlesworth?

A. Never had seen him before.

Q. You had heard about him?

A. I had heard about him.

Q. You had read about him?

A. I had read about him.

Q. Had you seen him on TV?

A. Never had.

Q. Had you heard about him on the radio?

A. Not to my knowledge.

Q. You knew he was a very ardent advocate of civil rights.

A. Just what I read.

Q. You knew that on April 4, 1962?

A. Just what I read in the newspaper.

Q. And you didn't hear that morning, April 4, 1962, that he was down at 19th Street and 2nd Avenue?

A. I did not.

Q. But you just left your post at 3rd Avenue and 20th Street?

A. I didn't leave 3rd Avenue and 20th Street. I was assigned to 3rd Avenue and 20th Street.

Q. But you hadn't gotten there?

A. I had never gotten there.

Q. That was about 10:30 in the morning?

A. 10:30.

Q. You were on your way then to your post?

A. Eventually I would have gotten there.

[fol. 72] Q. Were you on a motor bike or patrol car?

A. Walking.

Q. And you were coming from roll call, is that right?

A. No. I had been to roll call thirty minutes prior to that.

Q. But you had not reached your assignment?

A. That's right.

Q. Did I understand you to testify you were receiving some police information or some instructions?

A. I was giving some information.

Q. You were giving some information? Did that information have to do with this particular incident?

A. It did not.

Q. Or to either of these defendants?

A. It did not.

Q. To whom were you talking—another policeman?

A. No.

Q. Detectives?

A. No.

Q. A commissioner?

A. No.

Q. Where were you, sir, when you first observed these people with reference to this particular diagram? Would you mind showing us with this piece of chalk?

A. Is this going south?

Q. This is south, this is 19th Street, this is 2nd Avenue west to east here. (Indicating.) This is Newberry's and this is Pizitz and that is where Patrolman Hallman was standing.

A. Well, I was approximately about here. (Indicating.)

Q. You had just crossed the alley heading south on 19th Street?

A. I was across the alley. I don't know exactly how far.

Q. You were between the alley and 2nd Avenue going south on 19th Street?

A. That's right.

Q. At that time you saw Mr. Byars and the defendants [fol. 73] on this corner, is that right?

A. I saw him with a group of people.

Q. On that corner? Was that the first time you had seen either Mr. Byars or the defendants that morning?

A. No, I saw Officer Byars prior to that.

Q. Where had you seen him prior to that?

A. At roll call.

Q. Had you seen him after leaving roll call?

A. I saw him I believe in the basement at a place on 3rd and 19th having coffee. I am not positive, but I believe he was there.

Q. But you had not seen him on 19th Street around this area before seeing him talking to the defendants?

A. Not that I recall.

Q. Now, when you first observed them what did you do? When you first observed them standing there on that corner what did you do?

A. I didn't do anything.

Q. Didn't you proceed to the corner and join them?

A. After I saw him bring Shuttlesworth out to the curb.

Q. Was there a large crowd on that corner when you first looked down there?

A. Well, I couldn't say there was a large crowd. To the best of my knowledge maybe ten or fifteen or twenty people.

Q. Were they both white and colored people?

A. Well, I know there was colored. There was probably white too.

Q. But you saw the colored people?

A. I saw that is who Officer Byars was talking to.

Q. Was he talking to all colored folks?

A. He was talking to a group. Who he was talking to in particular I don't know at this time.

Q. He might have been talking to everybody on that corner?

A. As far as I know, he was talking to a group.

Q. And that group had some colored folks in it, you know, but you don't know whether it had white folks in it or not?

A. I couldn't say.

[fol. 74] Q. But ordinarily the average corner has both colored and white folks waiting on the light to change?

A. Ordinarily.

Q. And probably there was some white folks in that group?

A. Could have been.

Q. When you got up to Officer Byars after he brought the Defendant Shuttlesworth out to the curbline at the time you approached them, how many officers were there then?

A. Well, to the best of my knowledge there was maybe two or maybe one.

Q. Can you identify him?

A. I believe Mr. Hallman was there. I don't know whether Mr. Renshaw was there then or came up later.

Q. When you arrived there what did you hear Officer Byars say and do?

A. He asked him for some identification I believe.

Q. Asked who?

A. Shuttlesworth.

Q. And you knew him when you looked at him?

A. I sure didn't.

Q. What did he do then after he asked for the identification?

A. Well, maybe he talked with him. I don't know.

Q. You don't know what he said to him?

A. Sure don't.

Q. What happened between that time and the time he arrested Reverend Shuttlesworth? What did Mr. Byars say to the Reverend Phifer?

A. He told him he couldn't speak to Reverend Shuttlesworth.

Q. Was that before or after Phifer had spoken to Shuttlesworth?

A. He came up and started talking to him.

Q. And he told him he couldn't talk to him and told him to move on?

A. Something to that effect.

Q. And when he told him to move on he arrested him?

[fol. 75] A. Maybe he told him that twice.

Q. But after he refused to move on he arrested him?

A. After he refused to move on he arrested him.

Q. And that was ten or twelve or fifteen feet from the curbline of 2nd Avenue on 19th Street, ten or fifteen feet away from the intersection?

A. That is where he brought Shuttlesworth out.

Q. How long was it between the time you first saw these people gathered on this corner and the time the police patrol came up and took them away to jail? In your best judgment tell us how long that took.

A. From the time they were first arrested?

Q. No, sir, from the time you first saw them until the car drove away with them.

A. I would say ten.

Q. Could it have been less than that?

A. It could have been less than that.

Q. Might it have been five minutes?

A. Could have been five or ten or fifteen minutes. I don't know exactly.

Q. Could have been five though?

A. Could have been five. I don't know.

Mr. Hall: Thank you. That is all.

Mr. Walker: No questions.

(Witness excused.)

Officer CECIL W. DAVIS, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Walker:

Q. State your full name, please.
A. Cecil W. Davis.
Q. What is your occupation?
A. Policeman, City of Birmingham.
Q. How long have you been a police officer?
A. Well, it will be twelve years this coming March.
[fol. 76] Q. How long have you worked traffic?
A. Eleven years.
Q. Were you in traffic on April 4, this year?
A. Yes, sir, I was.
Q. On that occasion did you see either or both of these defendants?
A. Yes, I did.
Q. Where were you at the time you first saw the defendants?
A. I was on the southeast corner of 2nd Avenue and 19th Street.
Q. Was anyone with you?
A. Officer Hallman when I first saw them.
Q. What did you see on the corner by Newberry's?
A. On the corner at Newberry's I saw a group of colored people standing in a group there at the crosswalk.
Q. What were they doing?
A. Well, they were just standing around in a group.
Q. Was Officer Byars there at that time?
A. Yes, he was.
Q. What was he doing, if anything?
A. Well, where I was standing I couldn't tell, other than he was talking to them.
Q. He was talking to them?
A. He was making motions like he was talking.
Q. Were there more than these two people in the group?
A. Yes.

Q. In your best judgment how many people were there in that group?

A. Around ten or twelve.

Q. Did you ever cross the corner to go over there?

A. Yes, sir, I did.

Q. What happened then, if anything, when you crossed the street?

A. That is when I got over across the street, Officer Byars motioned in my direction and I came over with Officer Hallman and I was operating a motor and when I got off of it I heard Officer Byars tell them they were under arrest.

[fol. 77] Q. All of them? Was he speaking to the group as a whole?

A. Sir?

Q. Do you know if he was speaking to the group as a whole, or who was he talking to at that time?

A. He was talking to the group but he told Shuttlesworth he was under arrest.

Q. You heard him place Shuttlesworth under arrest?

A. Yes.

Q. Was the group still there at that time?

A. There was a group of people around, yes.

Q. What happened when he placed Reverend Shuttlesworth under arrest?

A. Well, my motor was parked over on the west side of 19th Street. That is, the 19th Street side of Newberry's. And I went over there and used my radio and radioed for a car to come down.

Q. Were you present subsequent to that or after that when Reverend Phifer was placed under arrest?

A. I was.

Q. Where were you when Phifer was placed under arrest?

A. I was at the corner when he was placed under arrest.

Q. Tell the court what you heard and saw at the time Defendant Phifer was placed under arrest.

A. I heard Officer Byars tell Phifer to go on, that Shuttlesworth was under arrest, and he insisted on talking to him.

Q. What happened then?

A. He placed him under arrest too.

Q. Did you see anything else on this occasion that you haven't testified to?

A. No, sir.

Mr. Walker: That is all.

Cross examination.

By Mr. Hall:

Q. Officer Davis, is there a rule that says once you arrest a man no one can talk to him?

A. A written rule?

Q. Yes, sir, any kind of rule.

[fol. 78] A. There is a rule that we do that.

Q. Is there a written rule—is that part of the rules of your department, or is that the law?

A. That is the procedure we take.

Q. Do you have a rule of procedure that is written down?

A. To my knowledge I don't know.

Q. But that is your general rule of procedure?

A. Yes.

Q. Once you arrest a man no one can talk to him?

A. That's right.

Q. If you arrest my wife I can't say anything to her, and if I do I am guilty of failure to obey an officer?

Mr. Walker: I object to that as argument.

Mr. Hall: That is not argument.

The Court: That would be construed as argument by the Court of Review, and I assure you it will.

Mr. Hall: I will withdraw it, but may I inquire further into this rule?

The Court: I will take the questions as they come.

Q. Officer Davis, do you have a police manual to guide you?

A. Yes.

Q. Does the manual say this is the rule?

A. In my particular manual I haven't seen it in this manual. I have read that manual now over eleven years.

Q. Has anyone of your superiors told you that was a rule?

A. Well, like I said, it is customarily what we are supposed to do. When one is under arrest no one is to talk to him.

Q. Have you been advised by the city legal department that was the law?

A. Not the legal department personally, no.

Q. But it is your understanding that once you have placed a man under arrest, or a woman, for any charge then no one is to be allowed to converse with him?

A. That's right.

Q. On the morning of April 4, 1962, Officer Davis, you [fol. 79] were on a motorcycle or a motor scooter?

A. Yes.

Q. Do you have a particular area assigned to you that morning?

A. Yes.

Q. What area were you assigned to?

A. My territory covers 4th Avenue North.

Q. All up and down 4th Avenue North?

A. East and west.

Q. That would be between what streets?

A. Well, I control the parking regulations in that vicinity on 4th Avenue I would say from 13th Street to 26th Street.

Q. From 13th Street to 26th Street your job is to patrol the parking meters and to observe traffic along 4th Avenue?

A. That's right.

Q. Now, that would be something like thirteen blocks?

A. Something similar to that.

Q. Do you have any other area, or did you have any other area at this time besides 4th Avenue?

A. We are not confined to that specific area when you have a call to make.

Q. You sometimes get calls?

A. Yes.

Q. You get them from your police headquarters?

A. By radio or by word of mouth.

Q. Now, on this morning had you reported to your assigned territory?

A. I had.

Q. Did you receive a call to proceed from there some place else?

A. I was told to go to 2nd and 19th and give the officer on the corner there a call number, which is to call home.

Q. You were told this by your superiors at the police headquarters?

A. It was word of mouth.

Q. So, actually, what you were doing down there was to tell Officer Hallman, the regularly assigned officer, something?

[fol. 80] A. Right.

Q. So, on this particular occasion you didn't go there yourself, you went there to carry this message to Officer Hallman?

A. That's right.

Q. Tell me this, Officer Davis: Do you know Defendants Fred Shuttlesworth and Reverend Phifer?

A. Yes, I do.

Q. You know both of them?

A. I know them both.

Q. Have you seen them on several other occasions?

A. Yes, I have. My beat covers 4th Avenue down around 17th and I see both of them down there quite often. I know them real well.

Q. Are they generally known to the police department of the City of Birmingham, would you say?

A. I would say generally.

Q. Would you say that was true on April 4, 1962?

A. Then I don't know.

Q. That was just this April, but at that time you had been in the Police Department some eleven or twelve years and you know as a matter of fact both of them had been involved in several actions against city laws having to do with segregation and integration?

A. Yes.

Q. You know they had been prosecuted several times by the City of Birmingham and arrested many times by police officers in the City of Birmingham?

A. I don't know that. I just know what I read in the papers.

Q. Had you read that in the papers that they had been arrested several times for violation of municipal ordinances having to do with segregation?

A. Yes.

Q. Officer Davis, were you aware on April 4, 1962 of the fact that Negro citizens of Birmingham were engaged in a selective buying campaign against downtown stores in the City of Birmingham?

A. Say that again.

[fol. 81] Q. Did you know on April 4, 1962 that the Negro citizens of Birmingham were engaged in a selective buying campaign against the downtown stores of Birmingham?

A. All I knew of was a rumor.

Q. You had heard rumors to the effect that that was true?

A. Well, I don't know whether it was true or not. I heard it was a rumor.

Q. That it was going on? Had anyone discussed it with you at police headquarters?

A. No.

Q. Had any of the downtown merchants discussed it with you?

A. No.

Q. Do you know whether any plainclothes policemen were assigned to downtown stores during this period of time?

A. No, I don't.

Q. Do you know whether or not police activities was concentrated in this area at this particular time in an effort to break up this particular campaign?

A. No.

Q. You had not been briefed by any of your superiors?

A. No, sir.

Mr. Hall: That is all, Officer Davis. Thank you.

Mr. Walker: No further questions.

(Witness excused.)

Mr. Walker: That is the City's case, Judge Bailes.

Mr. Billingsley: Your Honor, at this time we would like to file motion to exclude the testimony and for judgments in both cases.

The Court: The Court would have to overrule the motions.

Mr. Billingsley: Take exception, Your Honor.

Mr. Hall: If Your Honor please, may we have about five or ten minutes recess?

(Short recess.)

[fol. 82] EVIDENCE ON BEHALF OF THE DEFENDANTS

JAMES ARMSTRONG, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hall:

Q. Will you state your name and address, please, sir?

A. James Armstrong, 227 9th Court West.

Q. That is Birmingham, Alabama?

A. Yes.

Q. What is your occupation, please, sir?

A. I am a barber.

Q. Do you know the Reverend F. L. Shuttlesworth and the Reverend Phifer?

A. I do.

Q. Did you know them on April 4, 1962?

A. Yes.

Q. On that date, Mr. Armstrong, were you in downtown Birmingham at or near the intersection of 2nd Avenue and 19th Street about 10:30 in the morning?

A. I don't recall the date, but I was downtown with them one morning.

Q. On April 4, 1962 the Reverend F. L. Shuttlesworth was arrested for failure to move on at the corner of 2nd Avenue and 19th Street in downtown Birmingham. On that occasion were you there?

A. I was there.

Q. Were you there when the Reverend Phifer was arrested when he attempted to talk to the Reverend Shuttlesworth?

A. I was.

Q. And that was on April 4, 1962?

A. Yes.

Q. Now, Mr. Armstrong, were you with the Defendant F. L. Shuttlesworth on that occasion?

A. I was.

[fol. 83] Q. Had you traveled with him to the downtown area?

A. That day?

Q. That day.

A. I was.

Q. Had you been some place with him before you got downtown?

A. Yes.

Q. Where had you been?

A. The post office court room.

Q. That is the Federal Court, Federal post office?

A. Yes.

Q. Had you been involved in some legal matters there in the court room that morning?

A. That morning I don't recall.

Q. Had you been to court that morning?

A. Yes.

Q. What time were you in court?

A. About 9:30. Between 9:00 and 10:00 o'clock.

Q. Do you remember about what time you left the Federal Building?

A. I don't remember exactly.

Q. In your best judgment what time would you say it was?

A. It was past 9:30 because he was due in court at 9:30, and it was after 9:30 when we left I am sure.

Q. Let's go back a little bit and ask you—you were due there at 9:30?

A. Yes.

Q. You had some matter set at that time?

A. Sure.

Q. And you were there at that hour?

A. That's right.

Q. Do you remember which court, whether it was Judge Grooms or Judge Lynne?

A. Judge Grooms' court.

Q. Do you recall how long you were in court, or do you have some judgment as to how long you remained there in court?

[fol. 84] A. It wasn't long. Just got to the door I think and turned around.

Q. In your best judgment would it be five or ten or fifteen minutes?

A. No more than that.

Q. No more than ten or fifteen minutes?

A. No more.

Q. And you proceeded from there and did you go directly downtown?

A. We walked downtown.

Q. Now, where is the Federal Building?

A. You mean what street?

Q. Yes.

A. It is 5th Avenue, I believe, and 19th Street or 18th Street either one.

Q. 19th Street and 5th Avenue?

A. Yes.

Q. And you walked from that point to 2nd Avenue and 19th Street. Were you walking fast?

A. No, we weren't walking fast.

Q. You were walking slow?

A. Yes.

Q. Now, will you tell us, sir, what happened when you got to 2nd Avenue and 19th Street? Before you go into that, how many persons were with you?

A. About four or five. I am not sure.

Q. Walking along with you?

A. With me?

Q. Yes, sir, you and the defendants.

A. Reverend Phifer and Reverend Shuttlesworth was walking alone.

Q. And who else?

A. Well, the rest of them were behind us.

Q. The rest of who—whoever was with you?

A. Yes, and they are witnesses in the court.

Q. Who was with you, sir?

A. Nobody but Reverend Shuttlesworth and Reverend Phifer.

[fol. 85] Q. Now, you, Reverend Shuttlesworth and Reverend Phifer got to 19th Street and 2nd Avenue, is that correct?

A. That's right.

Q. They were together when you got there?

A. Yes.

Q. Tell the court what happened when you got to 19th Street and 2nd Avenue, or as you approached it. Begin with 3rd Avenue and 19th Street and tell us what happened.

A. Well, as we approached the corner on 19th Street and 2nd Avenue, as we walked up to the corner the light changed which stopped us, and the police came out of Newberry's and said, "Move on." And he said, "Move on" again and pointed to Reverend Shuttlesworth.

Reverend Shuttlesworth asked him, "Where to," and he said, "Anywhere, just move on."

And Fred said, "I will go in the store." So, he arrested him.

Q. And then he arrested him after the Defendant said he would go in the store?

A. Yes.

Q. Now, let's go back. As you came down 19th Street you were going south on 19th Street, is that correct?

A. Yes.

Q. Moving from 3rd Avenue to 2nd Avenue?

A. That's right.

Q. As you approached the alley did you see a police officer?

A. Well, I saw him—the whole time while I was there I saw policemen.

Q. Did you see the policeman that stopped you at the corner of 2nd Avenue and 19th Street—did you see him anywhere on 19th Street before the arrest?

A. No, I didn't see him until he came out of the store.

Q. You saw him when he came out of the store?

A. Yes.

Q. When he came out how long had you been standing on that corner?

A. Hadn't been standing.

[fol. 86] Q. What happened, he came out immediately as you came up to the corner?

A. Yes.

Q. Before you stopped he came out?

A. That's right. We were still moving coming to the corner.

Q. And he came out of Newberry's Department Store?

A. Almost side by side.

Q. And he said to move on. Now, where did he place himself when he stopped you?

A. He placed himself in front of me to Reverend Shuttlesworth.

Q. In front of you so you could not move on?

A. That's right.

Q. What were you doing, were you moving south?

A. Moving south.

Q. To cross at the corner of 19th and 2nd Avenue?

A. That's right.

Q. And your reason for stopping there was what?

A. The light.

Q. The light changed and was against you?

A. That's right.

Q. Now, did the policeman say "Move on" while the light was against you?

A. Yes.

Q. And he said "Move on" again?

A. Yes.

Q. And the Defendant Shuttlesworth asked him "To move where?"

A. That's right.

Q. And what did the officer say?

A. "Anywhere, just move on."

Q. And what did Reverend Shuttlesworth say?

A. "Well, I will go in the store."

Q. He started in the store?

A. Yes.

Q. Did you start with him?

A. No.

[fol. 87] Q. Did the Reverend Phifer start with him?

A. No.

Q. Reverend Shuttlesworth went on by himself?

A. But he didn't get hardly two steps in the store, he started to go in and the officer grabbed him by the arm.

Q. What happened then?

A. Well, he arrested him.

Q. After he arrested him?

A. What happened to me?

Q. To anybody, or to everybody. What did the police do with Reverend Shuttlesworth?

A. He carried him to the corner out on the curb of the street.

Q. I direct your attention to this diagram we have drawn on the blackboard here, this is Defendant's Exhibit 1 we are referring to, and it purports to be a drawing of the intersection of 19th Street and 2nd Avenue North. 19th Street is from top to bottom, that is north and this is south; 2nd Avenue goes from side to side, and this is 2nd Avenue West and that is 2nd Avenue East. (Indicating.) On this corner, which is the northwest corner of the intersection, is the Newberry's Department Store. Now, this is the corner, the northwest corner which you were approaching, as you said, when the policeman came up, is that correct?

A. That's right.

Q. Is there an entrance to the Newberry's Store right at this corner?

A. Yes, there is.

Q. Right at this corner there is an entrance to the Newberry's Store?

A. Yes.

Q. Now, after the policeman said for the Defendant Shuttlesworth to move on, he said, "Well, I will go in the store," and he started in the store and your testimony was the officer stopped him after he got about two steps?

A. Yes.

[fol. 88] Q. And then he took him where?

A. To the corner.

Q. Come and show us where you mean.

A. Here. This is the corner here. (Indicating.)

Q. Did he take him right on the corner?

A. About three or four steps from the corner.

Q. Along 19th Street?

A. That's right.

Q. How far from the corner would you say in terms of feet?

A. Well, just four or five feet I guess.

Q. Could it have been as many as ten or twelve feet?

A. It could have.

Q. When he took him over there what did he do?

A. Well, I guess he called the patrol wagon.

Q. Don't guess. What did he do?

A. That is all I could see.

Q. How close were you to him?

A. I was up beside the wall of Newberry's on 19th Street.

Q. About here? (Indicating.)

A. That's right. Observing.

Q. How many persons were along that wall with you?

A. I didn't pay any attention to how many.

Q. In your best judgment how many were there? Were there more than one or was there more than yourself there?

A. At the time he was arrested I guess maybe five or six.

Q. Five or six people were standing along this wall over here watching?

A. Sure.

Q. And you were standing there. Did you see the Reverend Phifer walk up to the arresting officer and the Defendant Shuttlesworth?

A. Yes.

Q. How close were you to them then?

A. I was standing in the same spot.

Q. How many feet would you say in your best judgment?

[fol. 89] A. The whole distance about ten feet.

Q. Could you hear what they said very easily?

A. No.

Q. Did you hear what the Reverend Phifer said?

A. No.

Q. You couldn't hear that?

A. No.

Q. Did you hear what the officer said to him?

A. No, I couldn't hear what he said.

Q. Did you see them take the Reverend Phifer into custody?

A. Yes, I did.

Q. Were you approached by the arresting officer and placed under arrest?

A. No.

Q. How many officers were present on the scene at that time?

A. I believe there was about three or four.

Q. Could we say that is your best judgment?

A. In my best judgment three or four.

Q. Could there have been as many as six?

A. On the arrest, no.

Q. At this particular time were they all standing there together, all these officers?

A. Yes.

Q. How long would you say it took them to arrest the Reverend Shuttlesworth and the Reverend Phifer and to take them away from the scene after you first arrived at the intersection?

A. Oh, I don't know. Maybe about five or six minutes or something like that.

Q. A very short time?

A. Very short time.

Q. The arrest was within minutes, would you say?

A. Sure.

Q. And after the arresting officer had removed the defendant to the side how long did it take the patrol car to then [fol. 90] come up and take them away?

A. I don't recall seeing a patrol car.

Q. Did you see any car at all come and take him away?

A. No.

Q. You don't remember how he was taken away?

A. I don't remember how he was taken away.

Mr. Hall: That is all.

Cross examination.

By Mr. Walker:

Q. Your name is James Armstrong?

A. Right.

Q. I believe you testified that you were coming down 19th going south on 19th coming from the Federal Courthouse?

A. That's right.

Q. There were four or five people in the group you were in or straggled out, coming together from the courthouse?

A. Sure.

Q. Now, when you got to the intersection of 2nd and 19th did you meet any friends you knew at that intersection?

A. No, I did not.

Q. Did anybody come up that knew the Reverend Phifer or the Reverend Shuttlesworth?

A. Not at that intersection.

Q. How many people were in your group at the intersection of 2nd and 19th?

A. I didn't have a group.

Q. Well, the people you were with.

A. Well, some of them were behind.

Q. Well, the ones that were behind and the ones that were —how many were coming from the courthouse?

A. About four or five.

Q. All told?

A. Maybe, yes.

Q. I believe you said you stopped at that intersection waiting for a light?

[fol. 91] A. That's right.

Q. Do you know how long the light holds red at that particular intersection?

A. I really don't know.

Q. Do you have an opinion?

A. Well, sixty seconds I imagine.

Q. You don't know that it holds seventeen seconds?

A. I don't know that.

Q. How long were you standing at that intersection?

A. I was walking to the intersection. I didn't get a chance to stand.

Q. Do you know whether the light changed while you were at the corner of 2nd and 19th?

A. Changed against me?

Q. For you or against you.

A. That is what we were waiting for, for it to change in my favor, but it did not.

Mr. Walker: No further questions.

Redirect examination.

By Mr. Hall:

Q. Do I understand you to say the officer came up to the intersection at the same time that you, the Reverend Shuttlesworth, and Reverend Phifer reached the intersection?

A. Yes.

Q. And he began talking to you there?

A. Began talking "Move on", yes, sir.

Q. And at that time the light had changed against you, is that right?

A. That's right.

Q. Did the light change while the officer was talking, or do you know?

A. No, the light was still holding.

Q. Where was the officer standing with reference to where you all were standing? Was he standing in front of you or behind you?

A. He was standing almost beside me.

[fol. 92] Q. Was he in front or behind the Defendant Shuttlesworth?

A. He was behind him but right at him.

Q. So, he came up at the same time that you reached the intersection?

A. That's right.

Q. You had not been standing there at all?

A. No, no. We walked there together.

Q. Incidentally, there has been some reference to the size of your group. Tell us were there many Negroes in town at all on this particular day?

A. No.

Q. Did you see any?

A. Very few.

Q. Isn't it a fact that this was during the time the Negroes of this city were carrying on a selective buying campaign in the downtown area?

A. Yes.

Q. Were you aware of that campaign?

A. Sure.

Q. Were Negroes generally aware of it?

A. Well, I guess so.

Q. Those with whom you came in contact communicated to you that they were aware of that campaign?

A. That's right, sure.

Q. And in your best judgment were they observing the campaign?

A. Well, I think so.

Q. They were not going into the downtown area, is that correct?

A. That's right.

Q. So that when you went downtown your group was conspicuous because of the fact there were very few Negroes in the downtown area?

A. Sure.

Mr. Hall: That is all.

Mr. Walker: No questions.

(Witness excused.)

[fol. 93] The Court: Could we come back in the morning?
Mr. Hall: Yes, Judge.
The Court: What hour?
Mr. Walker: 9:00 o'clock.

(Whereupon at 4:15 P.M. the court was adjourned until 9:00 o'clock A.M., October 30, 1962.)

Adjournment

October 30, 1962—9:00 A.M.

(Whereupon court was reconvened pursuant to adjournment.)

Robert J. Norris, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hall:

Q. State your name and address, please.
A. Robert J. Norris, 109 15th Court North.
Q. What is your occupation, please, sir?
A. Railroad mechanical helper, retired.
Q. Mr. Norris, are you also a minister?
A. I am.
Q. Are you presently engaged in the ministry?
A. Part time.
Q. Reverend Norris, are you acquainted with these defendants here, F. L. Shuttlesworth and the Reverend Phifer?
A. Yes, I am.
Q. Were you acquainted with them on April 4, 1962?
A. Yes, I was.
Q. On that date at about 10:30 in the morning did you see them in downtown Birmingham?
A. I did.

Q. Did you observe them at or about 19th Street and 2nd Avenue North?

A. I did.

Q. At that time will you tell the court what you saw happen, if anything?

[fol. 94] A. As we arrived they were walking just ahead of me.

Q. You were walking where?

A. On 19th Street.

Q. Were you walking north or south on 19th Street?

A. Going south on 19th Street.

Q. Where?

A. Between 2nd and 3rd Avenue.

Q. As you arrived where, at 2nd Avenue and 19th Street?

A. At 2nd Avenue and 19th Street.

Q. All right. Go ahead.

A. As we arrived at 2nd Avenue and 19th Street, them being just ahead of me, we all came to a slowdown for the traffic light and at that time the officer came out and—

Q. Came out from where?

A. From the entrance to Newberry's Store on the corner, and walked around ahead of the Reverend F. L. Shuttlesworth and said, "Move on." And the Reverend Shuttlesworth said, "Move where, Officer?" And he says, "Anywhere but here."

So, the Reverend Shuttlesworth said, "I will go in the store then."

So, the officer chased around and got up to him and caught him and told him he was under arrest.

Q. How close were you to the Reverend Shuttlesworth at that time?

A. Approximately five feet away.

Q. Were you walking with the Reverend Shuttlesworth?

A. No, I was just behind him.

Q. About five feet behind him?

A. About five feet behind him.

Q. Now, had you seen the officer before he appeared at that intersection?

A. Well, yes, sir, I saw the officer inside the store.

Q. Where was the officer when you first saw him?

A. Passing the door just before you get to the corner. He passed the door about the same time I did on the outside. [fol. 95] I was on the outside and he was on the inside.

Q. As you passed the door on the outside, that is the Newberry's door?

A. That's right.

Q. How close is that door to the corner of 2nd Avenue and 19th Street?

A. I don't recall just exactly the distance, but it is a very short distance. I am not sure whether it is middleways the store or a little closer to the corner than to the alley side.

Q. Reverend Norris, will you look at this diagram here on the blackboard which is Defendant's Exhibit 1 purporting to be a drawing of the 19th Street and 2nd Avenue North intersection. I direct your attention to this diagram. 19th Street runs from top to bottom, that is, from north to south on this board, and 2nd Avenue runs from west to east. Now, the Newberry's Store, this little oblong situation here is supposedly Newberry's Store, and it shows here on the diagram it is on the northwest corner of that intersection. Now, can you indicate here where in your best judgment that door is that you were talking about in this building?

A. There is a door on the 19th Street side. I believe it is near the center.

Q. Will you come up here and indicate it for us?

A. In my best judgment this door on the 19th Street side seemed to be somewhat along here. (Indicating.)

Q. About the center of the building?

A. About the center of the building.

Q. Is there another entrance here at the corner?

A. Yes, there is.

Q. Right there?

A. Here. (Indicating.)

Q. Now, let the record show the witness is indicating about the center of this oblong on 19th Street as being an entrance and the corner at 2nd Avenue and 19th Street as being an entrance.

Now, where you first saw the officer did you see him at [fol. 96] the center door as you passed?

A. He was headed toward the front the same as I was.

Q. You were walking on the outside on the sidewalk?

A. That's right.

Q. Alongside Newberry's Store?

A. That's right.

Q. And you saw the officer inside the store—that door is a glass door, is that right?

A. That's right.

Q. And you saw this officer walking inside toward the front of the building?

A. Yes.

Q. How fast were you walking?

A. Just a slow pace that you would walk in town.

Q. Just an ordinary pace?

A. Yes.

Q. How was the officer walking when you saw him?

A. He appeared to be a little bit faster than I was walking.

Q. Where did you next see this officer?

A. At the corner entrance. When I arrived at the corner entrance he was coming out the corner entrance.

Q. He was coming out as you arrived there?

A. He was coming out.

Q. Did you know the officer's name at that time?

A. I did not.

Q. Have you since found out who the officer was?

A. No, I have not.

Q. Was that the officer that arrested Reverend Shuttlesworth on that occasion?

A. It was the one.

Q. And if I told you his name was Officer Byars, that would be the same man that arrested Reverend Shuttlesworth on that occasion? You were there, were you not?

A. Yes, sir.

[fol. 97] Q. Did you arrive at that corner about the same time that Reverend Shuttlesworth did?

A. Almost. Just a step or two ahead.

Q. And the officer came out of the store at that same time?

A. That's right.

Q. Was the Reverend Shuttlesworth standing on that corner when the officer arrived?

A. I might say he was standing because he had just come to a stop.

Q. He had just come to a stop?

A. The light had turned red and everybody going that way was supposed to stop.

Q. And the officer came up there?

A. About the same time. It all happened about the same time. About the time he stopped he walked around in front of him and said, "Move on." And then he asked, "Move on where, Officer?" because he was in front of him and he asked, "Move on where?"

He said, "Anywhere but here." So, then he turned and says, "Well, I will go in the store."

Q. The officer had not at that time placed him under arrest?

A. No, he had not.

Q. Did you hear the officer when he said, "You are under arrest"?

A. Yes.

Q. Was that after the Reverend Shuttlesworth had attempted to go in the store?

A. It was.

Q. Now, you were standing there at that corner at that time. Did you move on when the officer said "Move on"?

A. No, I did not. I had nowhere to go, nowhere to move on.

Q. Did you see anyone else move anywhere?

A. No one but the Reverend Shuttlesworth.

Q. He is the only one who attempted to move, is that right?

A. That's right.

Q. Did the officer arrest anyone else other than the Reverend Shuttlesworth?

[fol. 98] A. No, not at that particular moment.

Q. Were you still there on that corner when that officer arrested the Reverend Phifer?

A. I was.

Q. Where were you standing at that time?

A. Almost in the same place.

Q. Almost in the same place?

A. Just turned around.

Q. You hadn't moved from that spot?

A. That's right.

Q. After the officer arrested Reverend F. L. Shuttlesworth what did he do with him?

A. He taken him over near the corner at the police car.

Q. The police car?

A. He taken him over near the corner—I don't know whether it was a police car on that corner or not, but he taken him over at the corner at the edge of 19th Street.

Q. At the edge of 19th Street near the curb on 19th Street?

A. Yes.

Q. About how far from the intersection there of 2nd Avenue?

A. How far from the intersection?

Q. Yes.

A. It was right on the particular corner.

Q. Right on the corner?

A. Yes.

Q. Directing your attention again to Defendant's Exhibit 1, Reverend Norris, and pointing out to you this is 2nd Avenue, this is the north curbline of 2nd Avenue, and this is 19th Street; now, this is the corner where the incident occurred. (Indicating) Where with reference to that corner, in your best judgment, did the officer take the Reverend Shuttlesworth after he arrested him?

A. You want me to come and point it out?

Q. Yes, please.

A. Right here. (Indicating)

Q. Now, that is the entrance to Newberry's Store. Now, [fol. 99] this is the curbline here.

A. Right here. (Indicating).

Q. About right there? In your best judgment about how far is that from the 2nd Avenue curbline?

A. From the 2nd Avenue curbline?

Q. Yes.

A. It is across the walkway. I would say about eight feet, whatever the distance of that walkway is.

Q. Could have been ten or twelve?

A. Could have been.

Q. So, he took him over there on that curbline?

A. Yes.

Q. Will you tell the court what happened there?

A. He called for Reverend Phifer.

Q. Who called for him?

A. Reverend Shuttlesworth.

Q. Where was the Reverend Phifer?

A. Reverend Phifer was standing some place in the same crowd. We had all gotten mixed together at that time.

Q. Where, there on that corner?

A. Near that corner. We had stopped there first to observe that traffic light.

Q. There were quite a few people there on that corner then?

A. That's right.

Q. Were there some white persons standing there then?

A. There were.

Q. And some colored persons?

A. Yes.

Q. And you were all standing there watching the officer and the Reverend Shuttlesworth, is that right?

A. That's right.

Q. Now, go ahead and tell the Court what happened. You say Reverend Shuttlesworth called for Reverend Phifer?

A. That's right. And the Reverend Phifer went over to [fol. 100] him and the officer said, "You can't talk to him unless you want to go to jail." And immediately he put Reverend Phifer under arrest and said, "You are also under arrest." So, they stood the two up side by side.

Q. All during this time you remained there on that corner?

A. I did.

Q. You were there when the officer first walked up?

A. That's right.

Q. And you were there after they took the Reverend Shuttlesworth and the Reverend Phifer to jail.

A. That is true.

Q. Were there other persons there who remained there all during this time?

A. Yes, quite a number of them.

Q. Quite a number out there on that corner observing this arrest?

A. That's right.

Mr. Hall: That is all. Thank you.

Cross examination.

By Mr. Walker:

Q. Reverend Norris, you testified, I believe, that the Defendant Shuttlesworth called Phifer; is that true?

A. That is true.

Q. Now, what was the conversation that transpired when the Defendant Phifer came on the scene?

A. When he came to the Reverend Shuttlesworth?

Q. That's right.

A. I know of no conversation. I know the officer placed him under arrest.

Q. What did the officer say to him?

A. The officer said, "You can't talk to him."

Q. Had Phifer attempted to talk to the Defendant Shuttlesworth at that time?

A. He hadn't quite got to him.

[fol. 101] Q. And he just said, "You can't talk to him," before he ever said a word?

A. That's right.

Q. And then he arrested him before he ever said anything?

A. Unless he said something though that I couldn't hear. I couldn't hear what transpired over there. I was about eight or ten feet away, but he arrested him immediately.

Q. And there was no conversation you say to the effect that, "I am going to talk to him," and the officer says, "I told you three times already you are not going to talk to him, I will arrest you;" that didn't transpire, or words to that effect?

A. I heard no words of that nature.

Q. And is it your testimony that the defendant Phifer just came out of a store, or wherever he was, and came up to the Defendant Shuttlesworth who was being arrested and the officer out of a clear blue sky says, "You can't talk to this defendant"?

A. That's right.

Q. And then he arrested him forthwith?

A. That's right.

Mr. Walker: No more questions.

Redirect examination.

By Mr. Hall:

Q. Now, was the Reverend Phifer standing on the corner near you when the Reverend Shuttlesworth called him?

A. He was.

Q. He wasn't in a store, was he?

A. No.

Q. He was there on that corner where Reverend Shuttlesworth had been arrested?

A. Yes, sir.

Q. You heard the Reverend Shuttlesworth call to him?

A. Yes, I did.

Q. And the Defendant Phifer responded to that call and walked up to the officer and Reverend Shuttlesworth?

A. Yes.

[fol. 102] Q. You heard the officer say, "You can't talk to the man, he is under arrest"?

A. That's right.

Q. But you didn't hear any other conversation?

A. No, I did not.

Q. Is it possible there was some other conversation that you may not have heard?

A. I hardly think so, but yet there could have been because sometimes the crowd was a little noisy and there might have been something said I didn't hear.

Q. But you did hear the officer say, "You can't talk to this man, he is under arrest"?

A. That's right.

Q. Reverend Norris, when the officer first approached at that corner did he address the Defendant Reverend Shuttlesworth by name?

A. When he first arrived at the corner?

Q. Yes, when he said, "Move on."

A. No.

Q. Did he ever address the defendant by name?

A. No, not that I know of.

Mr. Hall: That is all.

Mr. Walker: No questions.

(Witness excused.)

Walter King, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hall:

Q. State your name and address, please, sir.

A. Walter King.

Q. And your address?

A. 4225 43rd Avenue North.

Q. That is in the city of Birmingham?

A. Yes.

Q. What is your occupation, please, sir?

[fol. 103] A. Well, I haven't had an occupation about ten years. I am on a pension.

Q. You are retired?

A. I am.

Q. What was your former occupation?

A. Boilermaker helper for the L&N.

Q. For the L&N?

A. Yes.

Q. That is the Louisville Nashville Railroad?

A. Yes.

Q. And you have been retired for sometime?

A. Yes, 1954.

Q. Are you acquainted with the Defendant F. L. Shuttlesworth?

A. Well, I have been knowing him for a good little while.

Q. Are you acquainted with the Defendant Phifer?

A. I have been seeing him a good little while.

Q. Did you know them on April 4, 1962?

A. Yes. I knew him then.

Q. Did you see them on the morning of April 4, 1962 at about 10:30 o'clock in the morning?

A. Yes.

Q. Where did you see them?

A. I seen them down on 19th Street between 3rd and 2nd Avenue.

Q. Between 2nd and 3rd Avenue?

A. That's right.

Q. Will you tell the court what happened on that occasion, if anything?

A. Well, I was walking along behind him, me and Mr. Norris, and just before I got to the light—

Q. Just a moment. You were walking along 19th Street behind them?

A. Yes.

Q. Which way were you going on 19th Street?

A. Going south.

[fol. 104] Q. You were going between 3rd and 2nd Avenues?

A. That's right.

Q. All right. Go ahead for a minute.

A. Well, when I got up to the light the light turned red. They were stopped and I was right behind them, and all at once the police came from somewhere and come by me and says, "Get out." Reverend Shuttlesworth says, "Where to?"

He says, "I don't care where you go just so you leave here." And he said, "Well, I will go back in the store." And turned around; and I wanted to see what it was all about and I turned and went behind them and just before I got inside Newberry's Store he come by me again and said, "You are arrested," and pulled him on back.

Q. Was this at the corner of 2nd Avenue and 19th Street North?

A. What?

Q. Was this at the corner of 2nd Avenue and 19th Street North in the City of Birmingham?

A. That's right.

Q. Did you know the officer's name at that time?

A. No, I am not acquainted with any of the officers as long as I have been in Birmingham.

Q. Had you seen that officer before that time?

A. If I did I didn't know it.

Q. Were you arrested at that time?

A. No, he didn't say anything to me.

Q. How close were you to the Reverend Shuttlesworth when the officer first appeared?

A. Right behind him.

Q. Right behind him?

A. There was one couple in front of me and him.

Q. Another couple of people between you and the Reverend Shuttlesworth?

A. Yes.

Q. How long did you say the Defendant Shuttlesworth [fol. 105] had been standing there at the corner when the officer appeared?

A. Looked like about three or four minutes or not hardly that long.

Q. Did the light change while he was standing there at 19th and 2nd Avenue? Did the light change, the traffic signal?

A. The light was red when they walked up there but after this trouble come I don't when it changed again because I didn't pay no more attention.

Q. When you first walked up what was the traffic signal?
A. It was red.
Q. That means it was red to pedestrians?
A. Yes.
Q. And you couldn't cross the street?
A. No, not unless you violated the law.
Q. You had to wait until it turned green?
A. That's right.
Q. Did that light turn green before the officer came up?
A. I don't know.
Q. You don't know?
A. I didn't pay any attention to that light. I didn't pay any attention because when I walked up there it wasn't too long before the police passed by me and I didn't pay any attention to the light any more.
Q. And you don't know whether there was a change or not?
A. No.
Q. Did you hear the officer when he first told Reverend Shuttlesworth that he was under arrest?
A. Yes.
Q. Did you hear the entire conversation between the officer and the Defendant Shuttlesworth?
A. No more than what he said, "Leave on."
Q. Well, you heard him say leave here or leave on or "Move on"?
A. Yes, and he asked him, "Where to" and he said, "I don't care as long as you leave here."
Q. How many times did you hear the officer ask Rev-
[fol. 106] erend Shuttlesworth to move?
A. That is all I heard.
Q. One time?
A. That is all I heard.
Q. Was there other folks there besides you and Reverend Shuttlesworth?
A. Lots of people standing there, white and colored.
Q. Was the officer addressing his remarks to the defendant Shuttlesworth or to all these people who were standing there?

A. He was looking at his face. He was looking right at him.

Q. When you say looking at his face to whom are you referring?

A. Reverend Shuttlesworth.

Q. He was looking into Reverend Shuttlesworth's face?

A. Yes.

Q. Did the officer place himself directly in front of the Defendant Shuttlesworth?

A. Just right about halfway in front of him and said, "Move on."

Q. Now, tell me this: Did any of the other persons standing there on the corner move on?

A. If they did, I didn't see them.

Q. Did you move on?

A. No. I stepped back a little bit.

Q. You stepped back?

A. Yes.

Q. Did you see the Reverend Phifer at that time?

A. Yes.

Q. You saw all the persons. Would you say there were eight or ten or twelve people standing there on that corner at that time?

A. Yes.

Q. Did they all remain standing there during this entire conversation?

A. Wasn't too long. Yes, they all stood there because they had to wait until the light changed. Now, I don't know whether they ever did disappear.

[fol. 107] Q. How long did all this take?

A. Well, I don't know exactly how long it was.

Q. In your best judgment?

A. I guess about five minutes.

Q. All of it took about that long in your best judgment? So, you heard the officer ask the Reverend Shuttlesworth one time to move on, is that correct?

A. Yes.

Q. And the Reverend asked him where?

A. That's right.

Q. And the officer said, "Anywhere but here"?

A. Uh huh.

Q. So, the defendant says, "Well, I will go in here into Newberry's"?

A. Yes. "Well, I will go in the store." And he turned immediately around and went to the door, and I wanted to see what it was about and I turned and went behind them.

Q. When you say he turned immediately around and went to the door, let me direct your attention to this diagram, Defendant's Exhibit 1, purporting to be a drawing of the intersection of 2nd Avenue and 19th Street North, showing here in this little oblong figure which purports to be Newberry's Department Store situated at the northwest corner of that intersection—

A. That's right.

Q. Assuming that this corner here, the northwest corner, where the incident occurred and that this is the corner of Newberry's Store there. (Indicating.) Will you indicate to us what door the Reverend Shuttlesworth went in or where the door was located he went into?

A. Right on the corner of 2nd Avenue and 19th Street.

Q. There is a door into the store right at that corner?

A. Right at that corner.

Q. Approximately how far from the place where the Reverend Shuttlesworth was standing waiting on the light to change in your best judgment?

[fol. 108] A. Well, I don't know. Some people was in front of him.

Q. I want to know about how far is that door to Newberry's Store from the place where the Reverend Shuttlesworth was standing talking to the officer?

A. I couldn't even place how far that was. Looked to me like fifteen or twenty feet.

Q. That is your best judgment?

A. Yes.

Q. So, the Reverend Shuttlesworth turned around then and proceeded to go into the store?

A. Yes.

Q. You turned around and went right behind them?

A. Yes.

Q. Were you ahead of the officer when you started in the store?

A. Yes.

Q. How far did you all get before the officer caught up with the Reverend Shuttlesworth?

A. When I noticed the officer he was passing by me and reached and got Reverend Shuttlesworth by the shoulder and said, "You are arrested."

Q. Had the Reverend Shuttlesworth got into the store at that time?

A. Just inside the door.

Q. Where were you?

A. I was just behind.

Q. You were not in the store?

A. No.

Q. But you were close enough to hear the officer say, "You are under arrest?"

A. Yes.

Q. The officer passed you; he didn't say anything to you?

A. No.

Q. Did he ever arrest you?

A. No.

[fol. 109] Q. Did he ever say anything to you at all?

A. No, never said anything to me at all.

Q. And that is the first time you heard him say anything about arrest?

A. That is the first time I heard him say anything about arrest.

Q. And during all this time you were in the immediate vicinity of both parties?

A. I was near enough to hear the conversation.

Mr. Hall: Thank you.

Mr. Walker: No questions.

(Witness excused.)

SIMPSON HALL, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hall:

Q. Will you state your name and address and occupation to the court.

A. Simpson Hall, employed at Loveman's.

Q. Where do you live?

A. 2421 Carlos Avenue, Powderly.

Q. Do you know these two defendants, the Reverend Shuttlesworth and the Reverend Phifer?

A. Yes, I do.

Q. Did you know them on the 4th of April, 1962?

A. Yes, I did.

Q. On that date did you see these two defendants on 19th Street at about 2nd Avenue North about 10:30 in the morning?

A. Yes, I did.

Q. Will you tell the court what happened at that time, if anything?

A. Well, I was traveling from 3rd Avenue going south on 19th Street. I were I guess about six or seven feet behind Reverend Phifer and Reverend Shuttlesworth walking.

Q. Excuse me. When you say you were going south on 19th Street, that means you were going from 3rd Avenue toward 2nd Avenue on 19th Street.

[fol. 110] A. That's right.

Q. Go ahead.

A. I was walking behind them and this officer come from out of this Newberry's. Before the Reverend Phifer and Shuttlesworth could get to the light he come and kind of stepped in front of Reverend Shuttlesworth and told him to move on. So, he asked the officer, says, "Move on where?" and he said, "Anywhere but here."

So, then, Reverend Shuttlesworth turned and went to go back into the store and he walked in the store and told Reverend Shuttlesworth he was under arrest.

Q. Now, when you say he turned and attempted to go back into the store, which store was that?

A. Newberry's Store.

Q. And he attempted to go into—is there an entrance to Newberry's near this corner?

A. Yes, it is the side entrance, the one that is facing 19th.

Q. Facing 19th?

A. Yes.

Q. How close were you to the officer and to Reverend Shuttlesworth at that time?

A. I was I guess five feet.

Q. Five feet?

A. Yes.

Q. Could you clearly hear what the officer said and what the Reverend Shuttlesworth said?

A. Well, all I heard Reverend Shuttlesworth say to the officer was to ask him where to move and so, he said, "Any place but here."

Q. You heard the officer make that statement?

A. Yes.

Q. How many times did you hear the officer ask the Reverend Shuttlesworth to move?

A. Once.

Q. In your best judgment how long did the Reverend Shuttlesworth stand there between the time the officer [fol. 111] came up and his attempt to go into the store?

A. Well, the minute that he told him to move Reverend Shuttlesworth asked him to "Move where?" and he said, "Any place but here," and, so, he turned and went into the store.

Q. Turned around?

A. Yes.

Q. He didn't say anything, just turned to go in the store?

A. Yes.

Q. What did the officer do?

A. He put his hand on his shoulder and said he was under arrest.

Q. Were there any other persons standing on that corner at the time the officer came up?

A. Well, that I can't recall right now.

Q. You hadn't quite reached the corner?

A. No, I hadn't.

Q. Do you know whether the light was green or red?

A. Well, they really hadn't got to the light, they were still walking and approaching the light.

Q. And we have reference of course to the traffic signal right there?

A. Yes.

Q. The one that controls pedestrians?

A. Yes.

Q. You don't know whether that traffic light was green or red?

A. No, I can't recall right now.

Q. You don't know whether or not other persons were standing on that corner besides the Reverend Shuttlesworth?

A. No, I don't.

Q. Did you see some other persons standing with Reverend Shuttlesworth?

A. Well, Brother Armstrong.

Q. You saw him?

A. Yes, those three.

Q. You saw the Reverend Phifer too?

A. Yes.

[fol. 112] Q. And all of them were standing there at that same time?

A. Well, I never did see them standing.

Q. You saw them approach the corner?

A. Yes.

Q. I mean all of them were together about the same time?

A. Yes.

Q. Did you remain in that vicinity during the time that the Reverend Phifer was arrested?

A. Yes, I did.

Q. Will you tell the court the circumstances of that arrest?

A. Well, I wasn't watching Reverend Phifer, I was looking at Reverend Shuttlesworth and I don't know how Reverend Phifer got arrested.

Q. You don't.

A. No.

Q. You didn't hear any conversation between Reverend Phifer and the officer?

A. No, I didn't.

Q. You were working at Loveman's during that time?

A. Yes.

Q. Loveman's is a department store in downtown Birmingham?

A. Yes.

Q. Would you say it is perhaps the largest store in the Birmingham area?

A. Well, it is supposed to be.

Q. Did you know at that time that there was a selective buying campaign being carried on by the Negroes in the City of Birmingham?

A. Well, that I really don't know.

Q. Do you recall hearing this matter discussed in your department store at any time?

A. No, I don't.

Q. Do you remember seeing Negroes at all in Loveman's Department Store during this time?

A. I really don't work in the department store. I work [113] in the warehouse.

Q. So, you would have no knowledge of what was going on downtown?

A. No.

Mr. Hall: Thank you very much.

Cross examination.

By Mr. Walker:

Q. Your name is Simpson Hall?

A. That's right.

Q. And you were going south on 19th Street?

A. That's right.

Q. Were you coming from the post office?

A. No. I hadn't been to the post office.

Q. Now, you say that the Defendant Shuttlesworth when he was told to move on, says, "I will go into Newberry's," and went into the side entrance?

A. That's right.

Q. Will you come and point out the side entrance?

A. This would be Newberry's here. (Indicating) It would be this door right here.

Q. Let me ask you this: Is there a side entrance to Newberry's?

A. Yes.

Q. How many entrances do you have on the 19th Street side?

A. On the 19th Street side? There is three if I am not mistaken. There is one on the alley, one in the middle of the store, and this entrance here.

Mr. Walker: That is all.

Redirect examination.

By Mr. Hall:

Q. The entrance you say the Reverend Shuttlesworth went into is located on the corner of 19th Street and 2nd Avenue North, is that right?

A. That's right.

Q. And that is the entrance you indicated in response to Mr. Walker's questions?

A. Yes.

[fol. 114] Q. In your best judgment how far was that entrance from where the Reverend Shuttlesworth was standing when the officer first accosted him?

A. When he told him he was under arrest?

Q. No, when he first told him to move on.

A. Well, I guess maybe from here to the end of that thing there.

Q. From here to the end of this desk?
A. Yes.
Q. In your best judgment how many feet is that?
A. I guess about six feet.
Q. About six feet? Could it be eight or ten?
A. Yes, it could be.

Mr. Hall: Thank you.
Mr. Walker: No more questions.

(Witness excused.)

FRED L. SHUTTLESWORTH, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hall:

Q. Will you state your name and address, please?
A. Fred L. Shuttlesworth, 3164 29th Avenue North.
Q. What is your occupation, Reverend?
A. Minister.
Q. Are you one of the defendants in this case?
A. Yes.
Q. Reverend Shuttlesworth, on April 4th, 1962 did you have occasion to walk down 19th Street in the City of Birmingham at or near 2nd Avenue North at about 10:30 o'clock in the morning?
A. That is correct.
Q. At that time on that date did you have an experience —did an incident occur involving the City Police Department of the City of Birmingham?
A. That is correct.
Q. Will you tell the court what happened, please?
[fol. 115] A. Yes. James Armstrong, Phifer, and I had been up in Federal Court, and after some time after we left we walked down 19th Street. At this particular time we were walking as pedestrians walk approaching the light at the intersection of 19th Street and 2nd Avenue North in Birmingham. Almost instantaneously or simultaneously

with me as I got practically to the corner the officer came out of this door to my right and stepped in front of me. Along with me or beside me were Phifer and Armstrong. I think Armstrong was a little in the rear, as I recall.

The officer got in front of me and he said these words: "Move on." I said, "Move where, Officer?"

He said, "Anywhere but here, but move on." I said, "All right, I will go into the store."

So, immediately I turned and walked into Newberry's, the corner entrance there, and I had gotten approximately four or five steps inside the store and this same officer puts his hand on my right shoulder I believe and said, "You are under arrest."

And I said, "All right, sir."

He took me then to the curb line on 19th Street and there we stood for a few minutes.

Knowing I was under arrest and had to have bail and bond, I called Phifer and beckoned for him at the same time. I think he was standing at that time nearer Newberry's. I think he was up near Armstrong. Armstrong was standing besides Newberry's and Phifer was between the corner and Newberry's. I called his name and beckoned to him concerning getting a bail bonding company and checking with the attorney, and he came up and I started telling him what to do and the officer said to him, "You can't talk to him," or something like that, "or you are under arrest." And so, almost instantaneously he was under arrest too.

Then they put us I believe in a squad car on the 19th Street side, as I recall now, and we sat there for awhile and then they took us away.

Q. Reverend, had you seen this officer before he arrested [fol. 116] you on that morning?

A. I can't say that I saw him. There were several officers in that vicinity at that time.

Q. Several officers in the vicinity?

A. Yes. I mean I didn't know particularly whether that was the one I had seen or not.

Q. When you say officer you are of course referring to the police officer?

A. Yes.

Q. Did you know that officer's name at that time?

A. Not at the time.

Q. Do you know his name now?

A. I believe Officer Byars.

Q. Officer Byars?

A. Yes.

Q. That is the same officer whom you heard testify here?

A. Yes.

Q. Concerning the facts or the alleged facts of your arrest?

A. That's right.

Q. On this morning, Reverend Shuttlesworth, of April 4, 1962 had you reached the corner of 2nd Avenue and 19th Street?

A. I was approaching the corner. I guess I was a step or two away. See, the officer got in front of me, so, he was nearer the curb than I was, and I was right at the corner. So, he came and walked beside me and got in front of me. Had I walked on I would have walked into him.

Q. What we want to know, Reverend, were you still in motion when the officer appeared, or had you come to rest? Were you still walking or were you standing when the officer came up?

A. I would say I was approaching within a step or two of the corner.

Q. Then you were still walking, is that right?

A. Yes.

Q. And the officer came out and placed himself in front of you?

A. In front of me and the curb, yes.

[fol. 117] Q. Do you recall what the traffic signal indicated there at that corner at that time?

A. I think it was changing.

Q. It was changing at that time as you came up?

A. Yes, and we were slowing up, but at the same time I was observing traffic he was coming in so that my attention was on him.

Q. Did he address you by name?

A. No.

Q. Do you recall how many other persons were there at that corner?

A. With me James Armstrong, Phifer and I were right together, and I don't—things moving so swiftly there, I don't recall. There was two or three behind us, and there might have been another person or two on the corner at the time of my arrest.

Q. Do you have any recollection as to whether there were any white persons there on the corner at this time?

A. I would think so.

Q. You don't recall?

A. No.

Q. Do you remember whether or not traffic was heavy at that corner on the morning in question?

A. You mean pedestrian traffic?

Q. Yes.

A. No.

Q. There was no heavy pedestrian traffic that morning?

A. No.

Q. In either direction, neither up and down 19th Street or up and down 2nd Avenue?

A. There was not.

Q. Traffic was very light, is that what you are saying?

A. That's right.

Q. Did you stand there at the corner one or two minutes before the officer came up to arrest you?

A. I couldn't have stood at the corner one or two minutes. I was approaching the light.

Q. Did you?

[fol. 118] A. No.

Q. How long between the time you approached that corner and the officer appeared and the time you were arrested?

A. It couldn't have been over fifteen or twenty seconds. I guess it would have to be time for him to say, "Move on," and I to say, "Move where, Officer," and he said, "Anywhere but here, but move," and I said, "All right, I will go into the store." And I immediately just whirled and went into the store and it couldn't have been any length of time.

Q. In your best judgment then how long was it?

A. Maybe fifteen or twenty seconds.

Q. Could it have been as much as a minute?

A. From the time he said to me—

Q. From the time he approached you and the time he arrested you.

A. Oh, no, because he got to the corner about the time I did or before I did or simultaneous.

Q. And you were under arrest within a minute?

A. Within a half minute almost.

Q. Within a half minute after he appeared?

A. Yes.

Q. Reverend Shuttlesworth, you are fairly well known to the Police Department of the City of Birmingham, are you not?

A. I would say quite well.

Q. You have been frequently arrested because of your activities in the field of civil rights, have you not?

A. That's right.

Q. On the morning in question had you been involved in some civil rights litigations in the Federal Court?

A. I was supposed to have been.

Q. There was a trial then pending in the Federal Court, is that correct?

A. That's right, on my release from jail.

Q. Release from jail? What were the circumstances of your being in there?

[fol. 119] Mr. Walker: We object, Your Honor. That has no bearing on this case.

Mr. Hall: If Your Honor please, we insist it is very pertinent. It goes to our theory the reason for the arrest and the heavy penalty.

Mr. Walker: Your Honor, this is getting far afield from the charge.

The Court: Sustain the objection.

Mr. Hall: We want an exception, your Honor.

Q. Was there wide publicity given to this Federal hearing?

A. Yes.

Q. Had it been published in the newspapers?

A. It had.

Q. Was there publicity over the radio and by way of the television?

Mr. Walker: We object to this.
The Court: Sustained.
Mr. Walker: It serves no purpose.
Mr. Hall: Exception, Your Honor.

Q. How many times have you been arrested by the police of the City of Birmingham because of your civil rights activities?

Mr. Walker: We object, Your Honor. Immaterial.
The Court: Sustain.
Mr. Hall: We except, Your Honor.

Q. After you were arrested on the morning of April 4, 1962 did you at any time resist this arrest?
A. No.
Q. After the Reverend Phifer was arrested did he at any time resist the arrest?
A. He did not.
Q. When were you told why you were arrested?
A. When was I told why?
Q. Yes, or what charge you had been arrested on.
A. I believe the only time that I heard of it—some officer came to the car as Phifer and I were sitting inside discuss-
[fol. 120] ing what they were going to put against us or something like that.
Q. They were discussing the charge to put against you?
A. Yes.
Q. How many officers were present at that time?
A. I believe two was in the car and one was standing on the outside that came up from where we had been standing. There were some more on that side too.
Q. Do you recall how many were on that side?
A. You mean all told?
Q. All told, yes, sir. How many officers were in the vicinity of 2nd Avenue and 19th Street at about the time of your arrest on April 4, 1962?

A. Well, let me see. I would think there were around five in that immediate area when I was arrested.

Q. Reverend, we want your best judgment—if you don't remember the exact number, we want your best judgment as to the number.

A. I am saying I think there were—because there were two across the street and this officer came outside and there was one officer at the alley and one across the street on the other side across the street from the alley, and then there was one I believe across diagonally from the corner where we were arrested, and in the area there had to be at least five officers when I was arrested.

Q. Is that your best judgment?

A. Yes, of course.

Q. Did they all come over to the corner when you were arrested?

A. During the time or after I was arrested, yes.

Q. They came over to that corner?

A. Yes, around the corner.

Q. Did they all participate in your arrest?

A. You mean did they all restrain me some way?

Q. Consult with each other?

A. Yes.

Q. And discussed the charge to be put against you?

A. Yes.

[fol. 121] Q. Aid and abet each, or whatever officers do in making an arrest, they all consulted and got together?

A. They discussed it and were talking, yes.

Q. Reverend Shuttlesworth, had you gotten into Newberry's Store when the officer arrested you?

A. I had gotten at least three or four strides inside the store.

Q. Inside the store?

A. Yes, inside.

Q. Was this the first time he told you you were under arrest?

A. That's right.

Q. Did he ever tell you at any time before he stopped you in that store that you were under arrest?

A. Oh, no.

Q. Did he ever mention arrest before that time?

A. He made only two statements, as I recall, at the corner: "Move on," and "Anywhere but here."

Q. And you turned to go in the store and then he came in the store and told you you were under arrest?

A. That's right.

Q. He never told you before that that you were under arrest?

A. The only time an arrest was mentioned was when he put his hand on my shoulder inside the store and told me I was under arrest.

Q. And he arrested no one else standing on that corner with you?

A. No.

Q. And he arrested no one else subsequently except the Reverend Phifer?

A. That's right.

Mr. Hall: That is all.

Cross examination.

By Mr. Walker:

Q. How far is a stride? You say three or four strides in Newberry's Reverend Shuttlesworth. How far is a stride?

A. Well, I don't know. It depends on how you are stepping.

[fol. 122] Q. Well, in that particular case how far were you in Newberry's?

A. To make it simpler, maybe four or five feet inside the store, or six. I hadn't gone very far inside the store. I was well inside the store, however.

Q. Now, you were coming and walking along 19th Street going south, I believe you testified?

A. That's right.

Q. And I believe you testified that Defendant Phifer, Armstrong, King, and Norris were with you or immediately behind you, is that correct?

A. That is correct.

Q. Where were you all going?

A. It was our intention at that time to go across the street, turn right at Pizitz, and go down that way back down to the motel. We had just left the court, Phifer and Armstrong and I, and these people caught up behind us. It was our intention to go to the right of Pizitz and go on back down to the motel.

Q. What motel were you going to?

A. We discussed going down to Gaston's Motel and have coffee or something.

Q. Gaston's Motel would be the other direction, wouldn't it? Isn't it on 4th? You would have had to turn around to get on 5th or 4th where the motel was?

A. Not if we had gone across the street and turned right at Pizitz—then we would have turned back, yes, down there.

Q. Why would you cross over to Pizitz side?

Mr. Hall: We object to that. He is a free American citizen and has a perfect right to be in downtown Birmingham and go any way or anywhere he wants to go. It has no bearing on this case.

The Court: Well, let him answer.

Mr. Hall: Exception, Your Honor.

A. What was the question?

Q. Why had you chosen to cross the street, which would be further? I am trying to find out for sure where you were [fol. 123] going, or if you were going some place before you got to the Gaston Motel.

A. Why did we want to cross the street?

Q. To get to the Pizitz side of the street.

A. We could have just as easily wanted to go past Pizitz. We just decided to cross the street and go down beside Pizitz corner.

Q. You were meeting anybody?

A. No. Just had got out of court a few minutes earlier.

Q. Where is the Gaston Motel?

A. 16th Street and 5th Avenue North.

Q. And when you were arrested just prior to being arrested where were you walking?

A. On 19th Street between 3rd and 2nd Avenue, going south on 19th Street toward the corner of Pizitz.

Q. And your destination was the Gaston Motel?

A. We had no particular destination. While walking to the corner, I don't know whether it was Armstrong said he hadn't had any breakfast and let's go to the motel and get some coffee, see, and that is why we said okay, we will go on to the motel, cross the street and turn right and go on to the motel.

Q. Then you weren't waiting for a change in the traffic light at the intersection—in other words, if you were going to Gaston Motel, there was no need for the traffic light to be green for you to cross the street?

A. Well, you don't cross on a green light, do you?

Q. Well, if you were going to Gaston Motel there was no need to cross 2nd Avenue? Where is Pizitz located?

A. You are talking about need. I don't know whether there was any need or not. We had just determined to go across the street.

Q. This is the intersection here. Where in regard to this diagram was Pizitz Department Store located?

A. Right below there. Right there. (Indicating)

Q. What corner is that?

A. I guess you would call that the south corner.

[fol. 124] Q. Would that be the southwest corner if this is west and this is south?

A. I believe so.

Q. And if you had crossed with the green light you would have crossed 2nd Avenue?

A. What do you mean by cross with the green light? You mean the walking light?

Q. Yes, the walking light. There has been a lot of testimony here that you stopped here waiting for a light to change. Now, what I want to find out is if you were waiting to cross here on your way to the Gaston Motel?

A. The Gaston Motel has no—

Q. Other than it was your destination?

A. No, we had said coming to the light—Phifer wanted some coffee and that was about the only place we could get it. We couldn't get any downtown.

Q. And you were going to cross with the green light here, is that correct?

A. When the walking light came on, yes.

Mr. Walker: That is all.

Redirect examination.

By Mr. Hall:

Q. Reverend Shuttlesworth, when you left 3rd Avenue going down 19th Street toward 2nd Avenue were you headed to Gaston's Motel?

A. No.

Q. Where were you going then?

A. Just downtown looking.

Q. Downtown?

A. Yes.

Q. When you approached 2nd Avenue and 19th Street was it your intention—well, we don't ask that. What happened as you approached 2nd Avenue and 19th Street?

A. We were coming to the edge of the curb, practically the edge of the curb.

[fol. 125] Q. Were you going across 2nd Avenue?

A. We were going to cross 2nd Avenue.

Q. Down 19th Street towards 1st Avenue, is that correct?

A. That is correct.

Q. And you were stopped there by the policeman?

A. That is correct.

Q. In your best judgment was the light on that corner with you or against you—the traffic control light?

A. I think it was changing when we approached the corner.

Q. When you say changing, it was turning red so you would have had to come to a stop?

A. Yes.

Q. You remember that?

A. Yes.

Q. But that was not stopped you, was it; the officer stopped you, is that correct?

A. The officer stopped me. I would have had maybe another step or two to the curb.

Q. He stopped you before you got to the curb and told you to move on? Were you in fact going toward Pizitz Department Store?

A. Toward the corner, yes.

Q. Do you recall, Reverend, if there was a selective buying campaign going on in the City of Birmingham at that time which was carried on by the Negro citizens of this community against the downtown stores?

A. There was.

Q. You know that that is true?

A. That's right.

Q. On this date and during this time did you see many Negroes in town at all?

A. Very very few.

Q. And there were quite a few officers in and about this vicinity?

A. Yes.

Q. Now, 2nd Avenue and 19th Street and 3rd Avenue and [fol. 126] 19th Street would be considered the heart of the downtown shopping district, would it not?

A. Yes.

Q. And ordinarily there would be many Negroes in that area?

A. Yes, and white.

Q. But on this occasion there were very few?

A. Extremely few.

Q. At that time had there been leaflets circulated among the Negroes urging them to not shop in downtown Birmingham?

A. There had been.

Q. You had seen such leaflets?

A. Yes.

Q. Do you know whether or not Negroes were abiding by the request of the persons who circulated these leaflets?

A. Yes.

Q. Now, you have testified that the three of you had decided to go across 2nd Avenue to Pizitz. That is a department store, is it not?

A. That's right.

Q. Pizitz is located on the south side of 2nd Avenue and on the corner of 2nd Avenue and 19th Street?

A. That is correct.

Q. And in order to get to Pizitz Department Store you would have to cross 2nd Avenue and 19th Street, is that correct?

A. That is correct.

Q. You never did get to Pizitz Department Store, did you?

A. No.

Q. On that particular occasion?

A. We did not.

Q. Did I understand you on cross examination to tell Mr. Walker that the three of you had discussed going to Pizitz and then going down to the Gaston Motel?

A. Yes. Phifer mentioned he had had no breakfast at all and a cup of coffee would do, and we had to go somewhere [fol. 127] else to get this; we couldn't get it down there.

Q. And I believe Mr. Walker brought out on cross examination that Gaston Motel was at 16th Street and 5th Avenue North?

A. Yes.

Q. Which would be quite a few city blocks from the place where all this occurred?

A. Yes.

Q. Now, I will ask you if the Gaston Motel—is that the A. G. Gaston Motel?

A. Yes.

Q. Is that a colored institution?

A. Yes.

Q. That belongs to Negroes?

A. Yes.

Q. They serve Negroes there in their cafe?

A. That's right.

Q. Why was it necessary for you to leave 19th Street and 2nd Avenue and go to 16th Street and 5th Avenue to get a cup of coffee?

Mr. Walker: We object to that, Your Honor, why.

Mr. Hall: Mr. Walker brought it out on cross examination. He made a big show of the distance.

The Court: Leave it out.

Mr. Hall: We want an exception, Your Honor.

Q. Are there any restaurants in the vicinity of 2nd Avenue and 19th Street North which serve Negroes?

A. Not to my knowledge, or not at that time.

Mr. Hall: That is all.

Recross examination.

By Mr. Walker:

Q. Reverend Shuttlesworth, why were you going to Pizitz?

A. For the same reason anybody else would go.

Q. Well, they had this selective buying campaign on. Were you going to make some purchases in Pizitz?

[fol. 128] A. I don't know what I would have decided to do after I got over there.

Q. You didn't have any plan or any reason to go to Pizitz, you were just going to Pizitz?

A. You might say that.

Q. Isn't it a fact you just now, realizing the route to Gaston, that instead of having been the content at the time, you just presently formed the intent to go to Pizitz?

A. I knew where Gaston Motel was a long time ago.

Q. And that is where you were going?

A. No, we were near the corner when Phifer mentioned he hadn't had any coffee.

Q. Well, were you going to Gaston or going to Pizitz? Did this suggestion for coffee come up before or after you were arrested?

A. Just before.

Mr. Hall: Excuse me. I object to this particular argument on this ground: The witness testified in answer to your first question he was going to Pizitz and then to Gaston. That was on your cross examination.

Mr. Walker: I don't believe he answered that.

Mr. Hall: We could let the reporter read it back and I think you will see he did say he was going to Pizitz and then to Gaston.

Q. Were you going to get coffee at Pizitz?

A. As I understand it, they don't serve coffee to Negroes at Pizitz.

Q. Then that would just kill time so you would be hungry when you got to Gaston's?

A. That is your interpretation.

Mr. Walker: No further questions.

Mr. Hall: That is all.

(Witness excused).

James S. Phifer, called as a witness, being first duly sworn, was examined and testified as follows:

[fol. 129] Direct examination.

By Mr. Hall:

Q. Is this the Reverend James S. Phifer?

A. It is.

Q. Reverend, are you one of the defendants in this cause?

A. I am.

Q. Will you give us your address, please?

A. 22 17th Avenue South, Birmingham, Alabama.

Q. You are a minister?

A. I am.

Q. Reverend Phifer, on April 4, 1962 at about 10:30 in the morning were you in the vicinity of 19th Street and 2nd Avenue North in the City of Birmingham, Alabama?

A. I was.

Q. Will you tell the court what, if anything, occurred at that time and on that occasion?

A. At that time and on that occasion we came from the court house—probably not court house, but the post office—

Q. Reverend Phifer, may I ask you this one question: When you say we do you mean to refer—will you identify everyone with you by name?

A. Reverend Shuttlesworth and Armstrong.

Q. Just the three of you?

A. The three of us.

Q. Were proceeding from the post office?

A. Yes.

Q. Where is the post office located?

A. On 19th Street and 5th Avenue.

Q. North?

A. North.

Q. And you started from the court house and you left the post office and walked down 19th Street in the city of Birmingham—now, you walked from 5th Avenue on 19th Street toward 4th Avenue, 3rd Avenue and 2nd Avenue and 1st Avenue—you were walking south, is that right, on 19th Street?

[fol. 130] A. South, yes.

Q. Go ahead and tell the court what happened from that point.

A. Well, as we were approaching the intersection of 19th Street and 2nd Avenue an officer walked from our right and stepped just before Reverend Shuttlesworth just before we got to the curb and told him to keep moving. He asked him, "To where, Officer?"

He said, "Anywhere but here." And he said, "I will go in the store."

And he turned to go in the store and I turned. Shortly after he turned and he entered just inside the door of the

entrance and the officer walked inside the door and put his hand on his shoulder and said, "You are under arrest."

And he said, "Well, I am under arrest then."

And he carried him over to the curb of 19th Street and stood him on the curb, and at that time he said, "Phifer, come here."

Q. When you say he said it—

A. Reverend Shuttlesworth.

Q. That is the Defendant Shuttlesworth here?

A. Right.

Q. Go ahead. And he was beckoning to you?

A. He called my name and said, "Phifer, come here." And I walked over within three or four steps of him and he was telling me to call the bailing and bonding company to come bond him out, and just as he said, "Call bailing and bonding company—" before I answered him or said anything back to him in reply the officer said, "You can't talk to him unless I arrest you with him."

And I stood there to hear what he was going to say and he said, "You are under arrest." And he put me over on the curb with him.

Q. They then took you on to jail?

A. Yes.

Q. Did he tell you at that time why he was arresting you? Did he place any charge on you then?

A. No, he did not tell me.

[fol. 131] Q. When did you find out why you had been arrested?

A. Well, later in the car I heard.

Q. Later in the car?

A. Yes.

Q. Isn't it a fact that the charges hadn't been placed on you until later on when your attorneys and bondsmen came to the city jail to get you out?

A. Yes.

Q. They had to place a charge on you then so they could place a bond, isn't that correct?

A. Right.

Q. Reverend Phifer, when you refer to officer do you mean a police officer of the City of Birmingham, Alabama?

A. I do.

Q. Did you know the arresting officer at the time you were arrested?

A. No, sir, I didn't.

Q. Do you know him by name now?

A. Officer Byars.

Q. That is the same Officer Byars who testified in this court?

A. It is.

Q. Now, Officer Byars says that—you heard him, you sat here at the table and heard the Officer Byars testify—he testified he spoke three times to F. L. Shuttlesworth or to the crowd on the occasion of you standing on that corner there at 2nd Avenue and 19th Street and he said, "I am telling you for the first time and second time and third and last time to move." Did you hear him say such a thing?

A. I did not.

Q. How long had you stood there at that corner before the officer approached?

A. I didn't stand at all.

Q. He was there by the time you got there?

A. Right.

[fol. 132] Q. Now, where was the first point at which you saw Officer Byars on the morning of April 4, 1962?

A. When he came out of the store to my right.

Q. Out of the Newberry's Store to your right?

A. Yes.

Q. Had you seen him earlier on 19th Street down around the alley at any place?

A. Not to my knowledge.

Q. Had you observed him anywhere along 19th Street as he might have been observing you as you walked along?

A. Not to my knowledge.

Q. And you are saying, sir, that at the same moment you arrived at the corner of 2nd Avenue and 19th Street Officer Byars arrived there, is that what you said?

A. When I saw him he was coming out around the entrance to my right.

Q. Were you already on the corner?

A. We were approaching the corner. We hadn't stopped.

Q. So, when you got to the corner he got to the corner about the same time?

A. Just before we got to the curb he stepped around in front of Reverend Shuttlesworth.

Q. He stepped around in front of Reverend Shuttlesworth?

A. Yes.

Q. Did I understand your testimony—what were his words when he stepped around in front of him?

A. He said, "Keep moving."

Q. Was he addressing his words to the crowd in general or was he looking at the Reverend Shuttlesworth?

A. He was looking at Reverend Shuttlesworth and standing directly in front of him.

Q. And when he said, "Keep moving," what did the Reverend Shuttlesworth say?

A. He said, "Where, Officer?" He said, "Anywhere."

Q. And then what happened?

[fol. 133] A. He said, "I will go in the store." And he whirled immediately to go in the store and I turned around also and Reverend Shuttlesworth started in the door and he put his hand on his shoulder and said, "You are under arrest."

Q. How long did this little interchange take in point of time?

A. Within seconds.

Q. Are you saying it didn't take a minute?

A. No, it didn't take a minute.

Q. That is from the time the officer walked up to the intersection and until the time he reached over and told the Reverend Shuttlesworth that he was under arrest, is that correct?

A. Correct.

Q. Less than a minute?

A. Yes.

Q. At this time were you and the Reverend Shuttlesworth involved in some civil rights litigation in the Federal Court?

A. Yes, we were.

Q. Was it given wide publicity in the daily newspapers?

A. It was.

Q. Would you say headlines?

A. Sure.

Mr. Walker: We object to this line of questioning. It is immaterial about a proceeding being held in Federal Court.

Mr. Hall: We think it is very material.

The Court: Please leave it out.

Mr. Hall: We want an exception, Your Honor.

Q. Reverend Phifer, have you been arrested many times by the city police in the City of Birmingham?

A. Yes, I have.

Mr. Walker: We object to that, Your Honor. It has no bearing how many times the defendant has been arrested.

The Court: Sustain the objection.

Mr. Walker: And move to exclude the answer.

The Court: Sustained.

[fol. 134] Mr. Hall: We want an exception, Your Honor.

Q. Reverend Phifer, are you very well known by the city police of Birmingham because of your civil rights activities?

A. I would say yes.

Q. Directing your attention to the corner of 2nd Avenue and 19th Street on the morning of April 4, 1962, had you seen any Negroes in that vicinity other than your group?

A. Not to my knowledge.

Q. How many policemen had you seen along that street as you walked down that street?

A. Well, I saw probably four or five, in different directions.

Q. Was that an unusual number of policemen for that particular section at that time of morning?

A. To my knowledge it was.

Q. You are familiar with that area, aren't you?

A. Yes.

Q. You had walked along that street many times?

A. Yes.

Q. You had never been molested before for walking along that street, had you?

A. No.

Q. You had stood on corners and waited for lights to change, had you not?

A. Yes.

Q. Had you had occasion to stand on corners as long as two or three minutes and wait on lights to change at other times?

Mr. Walker: We object to standing on corners at other times. The only thing material is this occasion.

Mr. Hall: We contend all this other is material. This is not a simple case of just obeying an officer.

The Court: That is all he is charged with and we will stick to the charge and I guarantee you you will be safer when you get to Washington.

Mr. Hall: We want an exception, Your Honor.

[fol. 135] The Court: You have it.

Q. Reverend Phifer, when the Reverend Shuttlesworth turned after the officer accosted him on the occasion in question did you turn with him?

A. I turned immediately after he turned.

Q. When you say immediately after what do you mean?

A. When he turned to go into the store I turned too.

Q. To go into the store also?

A. Not necessarily.

Q. Where did you proceed—to what point did you go?

A. Well, after he put his hand on his shoulder and said, "You are under arrest," I walked across—would you mind me pointing out?

Q. No. Would you please let the record show this witness is pointing to Defendant's Exhibit 1 purporting to be a diagram of the area in question.

A. When he approached this intersection and he told him to keep moving he said, "Where?" and he told him, "Any place." And he said, "I will go in the store," and he turned to walk in the store.

Q. How far away was the entrance to the store in your best judgment?

A. I will say probably eight or nine feet, and he stepped inside the door. I don't know how far the officer walked in, and laid his hand on his shoulder and said, "You are under arrest."

Q. Were you near him when he laid his hand on his shoulder?

A. I had turned around a couple steps toward the entrance and he carried him over to the curb and I stood beside the building just opposite the door and he was standing with Reverend Shuttlesworth somewhere in this area. (Indicating)

Q. When you say somewhere in this area will you identify where you are pointing?

A. 19th Street about twelve or fourteen feet from the corner.

Q. Twelve or fourteen feet from the north curb of 2nd [fol. 136] Avenue along 19th Street?

A. Yes.

Q. That is north of the intersection there of 2nd Avenue and 19th Street?

A. Yes.

Q. And the officer was holding Reverend Shuttlesworth right there?

A. Yes.

Q. And the Reverend Shuttlesworth then did what?

A. Just stood there.

Q. What happened then, if anything?

A. He called me and beckoned for me to come to him.

Q. All right. What did you do?

A. I walked over within probably three feet of him and he was telling me to get in touch with the bail bonding company to bond him out.

Q. And that is when the policeman arrested you?

A. And the police interfered and said, "You can't talk to him." And I remained standing, I didn't move immediately, and he said, "You are under arrest."

Q. You knew at the time that this occurred there was a selective buying campaign instigated by the Negro citizens of this city against the downtown stores, did you not?

A. I did.

Q. And to your knowledge were Negroes going to the stores downtown? Were they doing any trading in the downtown area?

A. Well, few, if any.

Q. Did you see any doing any buying on the morning in question?

A. No, I didn't.

Mr. Hall: That is all.

Mr. Walker: No question.

(Witness excused.)

Mr. Hall: That is our case, Your Honor.

Mr. Walker: Your Honor, we would like to recall Officer [fol. 137] Renshaw for just one question.

REBUTTAL TESTIMONY ON BEHALF OF PLAINTIFF

Officer JAMES P. RENSHAW, recalled as a witness, being previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Walker:

Q. This is Officer Renshaw?

A. Officer James P. Renshaw.

Q. I believe you were sworn yesterday?

A. Yes, sir.

Q. And you testified yesterday, is that correct?

A. Yes, sir.

Q. I want to ask just one question, Officer Renshaw. Describe to the court the time interval on the traffic light at 2nd Avenue and 19th Street North. First, is that where the defendants were arrested?

A. That is correct.

Q. Then, if you would, describe the time intervals on the traffic light at that intersection.

A. Now, I can't say exactly what those lights are set at.

Q. Do you know what they were set at on April 4th?

A. I can't say exactly what they were set at. I can estimate.

Q. All right. Give your best judgment.

Mr. Hall: If Your Honor please, we object. The best evidence is the actual record of the setting of the lights. That could be obtained. It is in the possession of the City in one of their departments.

Mr. Walker: We withdraw the question. That is all. Come down.

(Witness excused.)

Mr. Walker: The City has nothing further, Judge Bailes.

Mr. Billingsley: Your Honor, at this time we would like to renew our motion to exclude the evidence and enter a judgment for the defendants in this case.

[fol. 138] The Court: Overruled.

Mr. Billingsley: Take exception, Your Honor.

Mr. Hall: We are through, Your Honor.

Mr. Walker: The City is through. We don't care to argue.

Mr. Hall: We will submit on the testimony.

The Court: Very well. Thank counsel. I will consider the matter further.

(After a recess the following occurred:)

(The judgment and sentences of the court were read by the Court in open court.)

STIPULATION

(It was stipulated by counsel in open court and with the approval of the Court that defendants have an exception to each adverse ruling in the minute entries and to rulings on oral objections in the trial.)

Mr. Billingsley: If Your Honor please, the defendants in both cases file now their motion for a new trial and ask the Court to suspend sentencing pending hearing on these motions.

The Court: Identical motions asking for a new trial?

Mr. Billingsley: Yes, sir.

The Court: I will enter these further entries. October 30, 1962, the defendant files motion for new trial; motion overruled; and I take it that the defendants give notice of appeal?

Mr. Billingsley: Yes, sir, and take exception to the ruling on the motion for new trial.

The Court: And the appeal bond is fixed in the sum of $300.00.

THE FOREGOING WAS ALL THE TESTIMONY AND PROCEEDINGS IN THE CASE

* * *

[fol. 139] Court Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 140] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 141]

IN THE CIRCUIT COURT OF JEFFERSON COUNTY

No. 23953

F. L. SHUTTLESWORTH,

vs.

CITY OF BIRMINGHAM.

ASSIGNMENTS TO ERROR

1. The Court erred in denying and overruling the defendant's Motion to Quash the affidavit, warrant and/or complaint filed in this cause (Tr. 3, 4, 10, 15, 16).

2. The Court erred in denying and overruling the defendant's demurrer to the affidavit, warrant and/Or complaint filed in this cause (Tr. 5, 6, 10, 16).

3. The Court erred in denying and overruling the defendant's Motion to Exclude the Testimony and For Judgment (Tr. 7, 10, 81, 137, 138).

4. The Court erred in denying and overruling defendant's Motion for New Trial (Tr. 8, 9, 11, 138).

5. The Court erred in sustaining the objections by the City of Birmingham as to reasons for the arrest and conviction of the appellant, especially regarding his civil rights activities (Tr. 118-134).

Orzell Billingsley, Jr., Peter A. Hall, Attorneys for Appellant.

Certificate of service (omitted in printing).

[fol. 142]

IN THE COURT OF APPEALS OF ALABAMA

JUDICIAL DEPARTMENT

OCTOBER TERM, 1964

6 Div. 929

F. L. SHUTTLESWORTH,

v.

CITY OF BIRMINGHAM.

Appeal From Jefferson Circuit Court

January 25, 1963

Transcript Filed

April 18, 1963

Come the parties by attorneys, and submit this cause on briefs for decision.

JUDGMENT—November 19, 1963

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs

and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 143]

IN THE COURT OF APPEALS OF ALABAMA

JUDICIAL DEPARTMENT

OCTOBER TERM, 1963-64

6 Div. 929

F. L. SHUTTLESWORTH,

v.

CITY OF BIRMINGHAM.

Appeal From Jefferson Circuit Court

PER CURIAM OPINION—November 19, 1963

Appellant, Fred L. Shuttlesworth, appeals from a conviction by the Circuit Court of Jefferson County, Alabama, of violating Sections 1142 and 1231 of the General City Code of Birmingham, Alabama. The case was heard by the Circuit Judge sitting without a jury. The first count of the complaint charges the appellant with loitering on a street corner with others so as to obstruct free passage along the sidewalk. The other count charges appellant with failure to obey the lawful command of a police officer.

[fol. 144] Section 1142 of the General City Code of Birmingham, Street and Sidewalks to Be Kept Open For Free Passage, reads:

"Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the city with any animal or vehicle, or with boxes or barrels, glass, trash, rubbish or display of wares, merchandise or sidewalk signs, or other like things, so as to obstruct the free passage of persons on such streets or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.

"It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on."

Section 1231 of the General City Code of Birmingham, Obedience to Police, reads as follows:

"It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

The evidence, as introduced by the City, tended to show that the defendant was a member of a crowd of about ten or twelve people standing on the corner of 19th Street and 2nd Avenue, North, in the City of Birmingham, and that this crowd was blocking the sidewalk to such an extent that some of the other pedestrians were forced to walk into the street to get around them. The crowd was accosted by one Officer Byars and asked to clear the sidewalk so as not to obstruct pedestrian traffic. The evidence further showed that the crowd remained and when requested to disperse for the third time by Officer Byars, defendant Shuttlesworth said, "You mean to tell me we can't stand here in front of this store?" at which time Officer Byars informed the defendant that he was under arrest. Officer Byars testified that at the

time of the arrest everyone had moved or was moving away except Shuttlesworth. After being told that he was under arrest, Shuttlesworth moved away saying, "Well I will go into the store." Officer Byars then followed Shuttlesworth into Newberry's Department Store and took him into custody.

[fol. 145] The appellant's first two assignments of error addressed to the action of the lower court in overruling appellant's motion to Quash and Demurrers to the complaint were overruled on the authority of *Phifer* v. *City of Birmingham*, 6 Div. 930, Ct. of Appeals Manuscript, which case was combined and tried with this one.

The third assignment of error presented by appellant is that the Court erred in denying and overruling the defendant's motion to exclude the testimony and for judgment. When there is sufficient evidence on the part of the prosecution to make out a prima facie case, a motion to exclude the evidence should be overruled. *Drummond* v. *State*, 37 Ala. App. 308, 67 So. 2d 280.

Appellant's fourth assignment of error was that the court erred in denying and overruling defendant's motion for a new trial. All the grounds set out and argued in appellant's motion for new trial, except ground 11, were grounds of a general nature and were properly overruled as sufficient evidence was introduced for the court to find the defendant guilty under the complaint.

The 11th ground of appellant's motion for a new trial is the same as his fifth assignment of error and reads:

> "The court erred in sustaining the objections by the City of Birmingham as to reasons for the arrest and conviction of the appellant, especially regarding his civil rights activities."

The following objections and rulings of the court thereon are alleged to be error by the appellant:

> "Q. There was a trial then pending in the Federal Court, is that correct?

"A. That's right, on my release from jail.

"Q. Release from jail? What were the circumstances of your being in there?

"Mr. Walker: We object, Your Honor. That has no bearing on this case.

"Mr. Hall: If Your Honor please, we insist it is very pertinent. It goes to our theory the reason for the arrest and the heavy penalty.

[fol. 146] "Mr. Walker: Your Honor, this is getting far afield from the charge.

"The Court: Sustain the objection.

"Mr. Hall: We want an exception, Your Honor.

"Q. Was there wide publicity given to this Federal hearing?

"A. Yes.

"Q. Had it been published in the newspapers?

"A. It had.

"Q. Was there publicity over the radio and by way of the television?

"Mr. Walker: We object to this.

"The Court: Sustained.

"Mr. Walker: It serves no purpose.

"Mr. Hall: Exception, Your Honor.

"Q. How many times have you been arrested by the police of the City of Birmingham because of your civil rights activities?

"Mr. Walker: We object, your Honor. Immaterial.

"The Court: Sustained.

"Mr. Hall: We except, Your Honor."

* * * * * * *

"Q. Why was it necessary for you to leave 19th Street and 2nd Avenue and go to 16th Street and 5th Avenue to get a cup of coffee?

"Mr. Walker: We object to that, Your Honor, why.

"Mr. Hall: Mr. Walker brought it out on cross-examination. He made a big show of the distance.

"The Court: Leave it out.
"Mr. Hall: We want an exception, Your Honor."

The sustaining of the objections to the foregoing questions was proper as such questions were irrelevant and immaterial to the issues involved.

The trial court, therefore, did not err by sutsaining such objections.

The judgment of the Circuit Court is

Affirmed.

[fol. 147]

IN THE COURT OF APPEALS OF ALABAMA

APPLICATION FOR REHEARING—December 4, 1963
AND OVERRULING THEREOF—January 7, 1964

Now comes the appellant in the above styled cause, and respectfully moves the Court for a rehearing of this cause, and prays that upon such rehearing, that the Order and Judgment of this Court made and entered on the 19th day of November, 1963, affirming the decision of the Circuit Court of Jefferson County, Alabama, finding appellant guilty of violation of Sections 1142 and 1231 of the General City Code of Birmingham, Alabama, and fixing his punishment and fine at $100.00 and One Hundred Eighty (180) days at hard labor for the City of Birmingham be set aside and held for naught, and that in lieu thereof a Judgment and Decree of this Court made and entered, reversing the said Judgment and sentence of the Circuit Court of Jefferson County, Alabama.

Peter A. Hall, Orzell Billingsley, Jr., Attorneys for Appellant.

January 7, 1964

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam.

[fol. 148] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

SIXTH DIVISION

Ex parte: Fred L. Shuttlesworth

No. 65

FRED L. SHUTTLESWORTH, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

DOCKET ENTRIES

January 22, 1964—Submitted on Briefs

February 20, 1964—Writ Denied (No Opinion)

March 6, 1964—Application for Rehearing Filed

March 26, 1964—Application for Rehearing Overruled

[fol. 149] [File endorsement omitted]

[fol. 150]

IN THE SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. 929

[Title omitted]

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS —Filed January 22, 1964

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

1. Comes the Appellant, by and through his attorneys, Peter A. Hall and Orzell Billingsley, Jr., and respectfully petitions this Honorable Court to review, revise, reverse, and hold for naught that certain Judgment of the Court of Appeals rendered on to-wit: November 19, 1963, wherein

Fred L. Shuttlesworth was Appellant and the City of Birmingham was Appellee, which Judgment affirms a Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 7th day of January, 1964.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner with violating Sections 1142, as amended, and 1231 of the General City Code of Birmingham, viz:

Count One

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve (12) months before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at to-wit: 2d Avenue, North, at 19 Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F.

[fol. 151] Count Two

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve (12) months before the beginning of this prosecution and within the City of Birmingham or the police jurisdiction thereof, did refuse to comply

with a lawful order, signal or direction of a police officer, contrary to and in violation of Section 1231 of the General City Code of the City of Birmingham.

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinances which formed the basis of the prosecution, as applied to Appellant, constituted an abridgment of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinances were unconstitutional on their faces.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty as charged and fined One Hundred Dollars ($100.00) and costs, and sentenced to a term of One Hundred and Eighty (180) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After judgment and sentence, petitioner filed a Motion for a New Trial, which Motion was denied and petitioner perfected his appeal.

7. Petitioner on appeal argued that at the time and place in question, he had done only what he had a constitutional right to do, and that his arrest was an attempt to enforce racial segregation in violation of the U. S. Constitution, but the Court of Appeals discounted their argument and affirmed his conviction.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinance and Complaint, the basis of the prosecution, are unconstitutional in that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty without due process of law, in

violation of the Fourteenth Amendment to the United States Constitution.

[fol. 152] B. That the Ordinance and Complaint, the basis of the prosecution and conviction, as applied to petitioner, constitutes an abridgment of the privileges and immunities, and a denial of due process of law, the equal protection of the laws, all in violation of the Fourteenth Amendment to the United States Constitution.

Wherefore, your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by law and the rules and practice of this Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmation of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises as to this Court may seem appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Peter A. Hall, Orzell Billingsley, Jr., Attorneys for Appellant.

[fol. 153] *Duly sworn to by Peter A. Hall, jurat omitted in printing.*

Certificate of service (omitted in printing).

[fol. 154]

IN THE SUPREME COURT OF ALABAMA

6th Div. 65

The Court Met Pursuant to Adjournment

Present: All the Justices

Ex Parte: Fred L. Shuttlesworth

Petition for Writ of Certiorari to Court of Appeals

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court

ORDER DENYING WRIT AND DISMISSING PETITION—
February 20, 1964

Come the parties by attorneys and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered and ordered that the Writ be and the same is hereby denied and the petition dismissed at the cost of the petitioner, for which costs let execution issue accordingly.

No Opinion

[fol. 155] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. 65

APPLICATION FOR REHEARING—Filed March 6, 1964

Now comes petitioner, in the above-styled cause, and respectfully moves this Honorable Court to grant to him a Rehearing in said cause, and reverse, revise and hold for naught its Judgment rendered on to-wit: the 20th day of February, 1964, denying petitioner the Writ of Certiorari

and his petition, and to enter an Order reinstating petitioner's said petition, and directing that a Writ of Certiorari be issued out of and under the Seal of this Court, to the Court of Appeals of Alabama, to the end that this cause may be reviewed and determined by this Honorable Court.

Petitioner further moves the Court to grant a Stay of Execution in this cause, during the pendency of this Application for Rehearing.

Submitted herewith is a Brief and Argument, in support of said Motion.

Peter A. Hall, Orzell Billingsley, Jr., 1630 Fourth Avenue, North Birmingham, Alabama 35203, Attorneys for Appellant.

[fol. 155a]

IN THE SUPREME COURT OF ALABAMA

6th Div. 65

The Court Met Pursuant to Adjournment

Present: All the Justices

Ex Parte: Fred L. Shuttlesworth

Petition for Writ of Certiorari to Court of Appeals

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court

ORDER OVERRULING APPLICATION FOR REHEARING—
March 26, 1964

It Is Ordered that the application for rehearing filed in the above styled cause on March 6, 1964, be and the same is hereby overruled.

[fol. 156] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 157] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 158]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1963

FRED L. SHUTTLESWORTH, Petitioner,

vs.

CITY OF BIRMINGHAM.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 19, 1964

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 23, 1964

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 19th day of June, 1964.

[fol. 159]

SUPREME COURT OF THE UNITED STATES

No. 423—October Term, 1964

FRED L. SHUTTLESWORTH, Petitioner,

v.

CITY OF BIRMINGHAM.

ORDER ALLOWING CERTIORARI—March 1, 1965

The petition herein for a writ of certiorari to the Court of Appeals of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
AUG 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 5

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

JACK GREENBERG
NORMAN AMAKER
10 Columbus Circle
New York, New York 10019

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

Attorneys for Petitioner

INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement 4

How the Federal Questions Were Raised and Decided Below 10

Reasons for Granting the Writ 11

I. Petitioner's Conviction Was Affirmed on a Record Containing No Evidence of His Guilt Contrary to the Due Process Clause of the Fourteenth Amendment 11

II. Petitioner's Conviction Was Secured Under Ordinances Which as Applied to His Conduct Are Unconstitutionally Vague 16

CONCLUSION 19

APPENDIX 1a

Order and Judgment of the Alabama Court of Appeals 6a

Order of Alabama Court of Appeals Denying Rehearing 7a

Orders of the Supreme Court of Alabama 8a, 9a

Table of Cases

PAGE

Bouie v. City of Columbia, —— U. S. ——, 12 L. ed. 2d 894 (1964) 17

Cole v. Arkansas, 333 U. S. 196 (1948) 13
Commonwealth v. Carpenter, 325 Mass. 519, 91 N. E. 2d 666 (1950) 17
Connally v. General Construction Co., 269 U. S. 385 (1926) 17

DeJonge v. Oregon, 299 U. S. 353 (1947) 13
Drummond v. State, 37 Ala. App. 308, 67 So. 2d 280 ..12, 3a

Ex Parte Shuttlesworth, 369 U. S. 35 (1962) 16

Fields v. City of Fairfield, 375 U. S. 248 (1963) 13

Garner v. Louisiana, 368 U. S. 157 (1961) 13

Lanzetta v. New Jersey, 306 U. S. 459 (1939) 17

Phifer v. City of Birmingham, 160 So. 2d 898, cert. den. 160 So. 2d 902 .....5, 18
Phifer v. City of Birmingham, 6 Div. 930, Ct. of Appeals Manuscript 3a

Shuttlesworth v. City of Birmingham, cert. den. 368 U. S. 959 (1962) 16
Shuttlesworth v. City of Birmingham, 373 U. S. 262 (1963) 16
Shuttlesworth v. City of Birmingham, 376 U. S. 339 (1964) 13, 16

Taylor v. Louisiana, 370 U. S. 154 13
Thompson v. Louisville, 362 U. S. 199 .....12, 13, 17

Wright v. Georgia, 373 U. S. 284 (1963) 12, 17

Statutes

PAGE

28 U. S. C. §1257(3) 2

General City Code of Birmingham, §1142 (as amended by §1436-F) 3, 4, 10, 1a

General City Code of Birmingham, §1231 ..... 3, 4, 10

Other Authorities

American Law Institute, *Model Penal Code, Tentative Draft*, No. 13, p. 14 17

Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L. J. 1 (1960) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Court of Appeals entered in the above-entitled case on November 19, 1963, rehearing of which was denied on January 7, 1964. A petition for writ of certiorari was denied by the Supreme Court of Alabama on February 20, 1964 and rehearing was denied on March 26, 1964.

Citation to Opinions Below

The opinion of the Alabama Court of Appeals (R. 143) is reported at 161 So. 2d 796 and is set forth in the appendix hereto, *infra*, p. 1a. The Supreme Court of Alabama rendered no opinion but its order denying certiorari is reported at 161 So. 2d 799.

Jurisdiction

The judgment of the Alabama Court of Appeals (R. 142) was entered on November 19, 1963, appendix, *infra*, p. 6a. Application for rehearing was overruled January 7, 1964 (R. 147), appendix, *infra*, p. 7a.

A petition for certiorari filed in the Supreme Court of Alabama was denied on February 20, 1964 (R. 154), appendix, *infra*, p. 8a and an application for rehearing was denied on March 26, 1963 (154), appendix, *infra*, p. 9a. On June 17, 1964, Mr. Justice Black extended petitioner's time for filing a petition for writ of certiorari in this Court to August 23, 1964.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Whether petitioner was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States by his conviction on a record containing no evidence of his guilt.

2. Whether petitioner was also denied due process of law by his conviction under ordinances which as applied to his conduct are unconstitutionally vague, under the Fourteeenth Amendment.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Section 1142 of the General City Code of Birmingham as amended by Ordinance No. 1436-F:

> Streets and Sidewalks to Be Kept Open for Free Passage.—Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the City with any animal or vehicle, or with boxes or barrels, glass, rubbish or display of wares, merchandise or sidewalk signs or other like things, so as to obstruct the free passage of persons on such streets or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.
>
> It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the City as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the City after having been requested by any police officer to move on.

and Section 1231 of the General City Code of Birmingham:

> Obedience to Police.—It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer.

Statement

Petitioner, Fred L. Shuttlesworth, a "notorious person in the field of civil rights in the City of Birmingham" (R. 48) was arrested on the morning of April 4, 1962 outside Newberry's Department Store at 19th Street and 2nd Avenue North in Birmingham, Alabama. He was tried and convicted in the City Recorder's Court of violating Sections 1142 (as amended by Section 1436-F) and 1231 of the General City Code of Birmingham and sentenced to a fine of $100.00 and costs and 180 days at hard labor (R. 1).

On appeal to the Circuit Court of Jefferson County, he was charged in a complaint containing two counts. Count one charged that F. L. Shuttlesworth:

> "... did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at, to-wit: 2nd Avenue, North, at 19th Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F" (R. 2).

Count two complained that petitioner:

> "... did refuse to comply with a lawful order, signal or direction of a police officer, contrary to and in violation of Section 1231 of the General City Code of the City of Birmingham" (R. 2).

In the Circuit Court, he was tried without a jury on October 29-30, 1962 (R. 15, 93), convicted and sentenced to $100 and costs, 52 days for failure to pay the fine and costs and 180 days at hard labor (R. 11).

The Alabama Court of Appeals on November 19, 1963, affirmed petitioner's conviction (R. 142), *infra*, p. 6a.

James Phifer, arrested simultaneously with Shuttlesworth, was tried with him on identical charges in the Circuit Court (R. 15-16) but his conviction was reversed by the Alabama Court of Appeals because of insufficiency of evidence, *Phifer* v. *City of Birmingham*, 160 So. 2d 898, cert. den. 160 So. 2d 902.

At the trial in Circuit Court the evidence offered by the City and that offered on behalf of petitioner and his co-defendant were in substantial contradiction. The City's chief witness, Police Officer Robert Byars who arrested petitioner, testified that about 10:30 a.m. on the morning of the arrest, he was standing on 19th Street just north of the alley between 2nd and 3rd Avenue North adjacent to Newberry's Department Store (R. 17). He saw petitioner and Phifer walking south on the west side of 19th Street toward 2nd Avenue "in company with three or four other people" (R. 17). Officer Byars then entered the alley entrance to Newberry's store located on the west side of 19th Street just north of the store (R. 17), walked through the store to the front entrance at the northwest corner of 2nd Avenue and 19th Street North (R. 18). From inside the entrance doorway, he looked out on the street (R. 18, 27) and saw petitioner "standing with a group of some ten or twelve people all congregated in one area" (R. 18). He observed the group "for a minute to a minute and a half while they stood" (R. 19). The group was "standing and listening and talking" (R. 18). "On some occasions," according to his testimony, "people who were walking in an easterly direction on the north side of 2nd Avenue had to go into the street to get around the people who were standing there" (R. 18).

He testified that he then "walked out of the store and informed the group of people they would have to move on and clear the sidewalk so as to allow free passage and not to obstruct it" (R. 19). "[S]ome of the group began to move gradually away" (19). "Not all of them began to move" and he "waited for a short time and again informed them they would have to move . . . " (19). At this point, petitioner Shuttlesworth is reported to have said "you mean to say we can't stand here on the sidewalk" or words to that effect (19). Officer Byars "said nothing in return," "hesitated again for a short time and informed them for the third and last time . . . they would have to move" (19). Petitioner then supposedly said "do you mean to tell me we can't stand here in front of this store?" at which time the officer informed him that he was under arrest (19). According to Byars' testimony, Shuttlesworth then said, "Well, I will go into the store" and started into the entrance of Newberry's Store (19). The officer stated: "he got inside the door and I reached and got him and told him again he was under arrest" (19).

Petitioner was then placed into custody "and taken to the west curb to await transportation to the City Jail" (R. 20).

Pedestrian traffic "was normal for a Wednesday at that particular time of day" (R. 21). When Byars first saw the group, they were walking south and not violating any ordinance or obstructing any traffic (R. 27). After he came out of the store and spoke to the group, he testified that "everybody else was in motion except the Defendant, Shuttlesworth, who had never moved" (R. 30). "No other person made any statement to [him] other than the defendant, Shuttlesworth . . ." (R. 20-21).

Other police officers corroborated Byars' testimony. Officer Renshaw testified that he first saw Byars when he was

talking to the group (R. 49); that he got off his motorcycle and walked over to the crowd (R. 49-50); that he heard Byars say, "For the third and last time, I am telling you you got to . . . move on, or words to that effect" (R. 51); that there were "eight or ten or twelve" persons in the crowd, "all colored" (R. 51) and that he recognized Shuttlesworth and assisted in his arrest (R. 50).

Officer Hallman testified that Byars called him and Officer Davis over from the southeast corner of 2nd Avenue and 19th Street North and that he went over and just as he stepped on the curb he heard Byars say, "I am telling you for the third time you will have to move on, you are blocking the crosswalk" (R. 62). He testified that there were 5 or 6 persons in the group and they all dispersed upon direction except Shuttlesworth (*Id.*).

Officer Byars testified that Shuttlesworth offered "no resistance" (R. 31) to the arrest. Another officer testified that force was not necessary in making the arrest (R. 50); that petitioner was "a docile prisoner" (R. 58) and that he did not give the arresting officers "any difficulty at all" (R. 58).

The evidence for the defense presented a very different version of what occurred. The petitioner testified that his co-defendant Phifer and a man named James Armstrong had been in federal court that morning and after leaving there walked down 19th Street "walking as pedestrians walk approaching the light at the intersection of 19th Street and 2nd Avenue North . . ." (R. 115). As they approached the intersection, "[a]lmost instantaneously or simultaneously with me as I got practically to the corner the officer came out of this door to my right and stepped in front of me" (*Id.*). The officer then said "move on" whereupon petitioner inquired "move where officer" (*Id.*). Byars said "anywhere but here, but move on" at which point peti-

tioner said "all right, I will go into the store" (*Id.*). At this point, petitioner turned and walked into the corner entrance to Newberry's store and had gotten approximately "four or five steps inside the store" when the officer said "you are under arrest" (*Id.*).

Petitioner Shuttlesworth further testified that it was the police officer who stopped him; he "would have had maybe another step or two to the curb" (R. 125). He stated that he never got to the corner and that "[h]ad I walked on I would have walked into him" (R. 116). The first time that he was informed that he was under arrest was when the officer stopped him in the store; the officer had not mentioned arrest before then (R. 121). Petitioner then continued:

> Q. When were you told why you were arrested? A. When was I told why?
>
> Q. Yes, on what charge you had been arrested on? A. I believe the only time that I heard of it—some officer came to the car as Phifer and I were sitting inside discussing what they were going to put against us or something like that.
>
> Q. They were discussing the charge to put against you? A. Yes (R. 119-120).

Petitioner's co-defendant, Rev. Phifer, testified that he and Rev. Shuttlesworth didn't stand on the corner at all (R. 131); that contrary to Officer Byars' testimony, Byars did not speak three times to petitioner or to the crowd (*Id.*); that in fact "[w]e were approaching the corner. We hadn't stopped" (R. 132); that Byars stepped around in front of Shuttlesworth "before we got to the curb" (*Id.*) and that he addressed his words only to Shuttlesworth (*Id.*).

Armstrong testified that he was with Shuttlesworth and Phifer on the morning of April 4th and that Byars came

out of Newberry's store when "[w]e were still moving coming to the corner" (R. 86), "placed himself in front of . . . Reverend Shuttlesworth" so he couldn't move (R. 86) and pointed to Shuttlesworth and told him to "move on" (R. 85). On cross-examination, he stated there were only four or five people in the group coming from the courthouse and "some of them were behind and when they got to the intersection they did not meet any friends there nor any one that knew Rev. Phifer or Rev. Shuttlesworth" (R. 90). When asked: "How long were you standing at that intersection," he answered: "I was walking to the intersection. I didn't get a chance to stand" (R. 91).

Another defense witness, Rev. Norris, testified that he was walking about 5 feet behind Shuttlesworth (R. 94); that when he first saw Officer Byars he was "passing the door just before you get to the corner" on the inside of Newberry's store as he, Norris, was passing on the outside (R. 94); that Byars came out from the entrance to Newberry's store walked around in front of Shuttlesworth and said "move on" whereupon Shuttlesworth said "move where officer" and Byars replied "anywhere but here" (R. 94). Norris testified that the only crowd that collected consisted of white and Negro persons standing there watching the officer and Shuttlesworth (R. 99), that there was "quite a number out there on that corner observing this arrest" (R. 100).

Another witness, Simpson Hall, testified that: "Before the Reverend Phifer and Shuttlesworth could get to the light he come and kind of stepped in front of Reverend Shuttlesworth and told him to move on" (R. 110). He and another witness, Walter King, testified that they only heard the officer ask Shuttlesworth to move one time (R. 110-106).

The entire arrest incident from the time the officer walked up to the intersection until the time he told Shuttlesworth that he was under arrest took less than a minute (R. 133).

The Court of Appeals did not attempt to reconcile the conflicts in testimony, holding that "the grounds set out and argued in appellant's (petitioner's) motion for new trial . . . were properly overruled as sufficient evidence was introduced for the court to find the defendant guilty under the complaint" (R. 145).

How the Federal Questions Were Raised and Decided Below

Petitioner filed a motion to quash the complaint (R. 3) alleging that "the allegations of the complaint, and each count thereof, are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend"; that "Sections 1231 and 1142 of the 1944 General City Code of Birmingham, under which said complaint is brought, as applied to this defendant, violates . . . the First and Fourteenth Amendments to the Constitution of the United States of America; "that the aforesaid Sections 1231 and 1142 as applied to the defendant is unconstitutional on its face, and that it is so vague as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment of the United States" (R. 3-4).

Petitioner also filed a demurrer alleging abridgment of his rights of free speech and assembly under the First and Fourteenth Amendments; a violation of the due process clause of the Fourteenth Amendment because of unconstitutional vagueness of the ordinances and a violation of the privileges and immunities and equal protection clauses of the Fourteenth Amendment (R. 5-6).

At the close of the City's case (R. 81) and again at the close of all the evidence (R. 137), petitioner filed a motion to exclude the evidence on the ground that there was no evidence to support the complaint and that all the evidence

showed was that petitioner was exercising rights and privileges guaranteed him by the First and Fourteenth Amendments (R. 7).

At the end of trial (R. 138), petitioner filed a motion for new trial renewing the allegations contained in the previous motions (R. 8-9).

All of petitioner's motions were overruled and petitioner was found guilty as charged (R. 10-11).

Petitioner renewed his federal constitutional claims by assignments of error to the Alabama Court of Appeals (R. 141) which without consideration of his constitutional claims affirmed his conviction (R. 142) *infra*, pp. 1a-5a. The Alabama Supreme Court denied petitioner's timely filed application for writ of certiorari (R. 154) and overruled his application for rehearing (*Id.*) *infra*, pp. 8a-9a.

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

I

Petitioner's conviction was affirmed on a record containing no evidence of his guilt contrary to the due process clause of the Fourteenth Amendment.

In affirming petitioner's conviction, the Alabama Court of Appeals did not consider the evidence contradicting the City's version of the circumstances leading to petitioner's arrest but merely upheld the Circuit Court's overruling of petitioner's motion to exclude the evidence, stating that "[w]hen there is sufficient evidence on the part of the prosecution to make out a prima facie case, a motion to

exclude the evidence should be overruled. *Drummond* v. *State*, 37 Ala. App. 308, 67 So. 2d 280" (R. 145).

But fully accepting the City's version of the facts, there is no evidence that petitioner committed a crime. He was charged under the language of the second paragraph of section 1142 for obstructing free passage or for standing or loitering after being reqeusted to move on (R. 2). But neither petitioner nor anyone else was arrested for obstruction of passage along the sidewalk for, as officer Byars testified, everyone obeyed his order to move (R. 37) "except the Defendant Shuttlesworth, who had never moved" (R. 30). Thus, Shuttlesworth's arrest appears to have been made only for failing to move when ordered to do so. But the evidence shows that petitioner did move—he started into the store; in the words of another officer, he "[j]ust walked off with the rest of the crowd" (R. 54). And if, as the City says, petitioner had already been placed under arrest when he began to move, it is clear that the only possible reason for his arrest was that he was the only person who made any statements to the officer while he was allegedly issuing his command to the crowd to move. According to the City's testimony, those statements were "do you mean to tell me we can't stand here in front of this store" (R. 19) and "well, I will go into the store" (19). Even if these peaceful statements (and there is no evidence that petitioner was anything other than peaceful) could be construed as arguing with the policeman, petitioner still did nothing criminal. Cf. *Thompson* v. *Louisville*, 362 U. S. 199, 206; *Wright* v. *Georgia*, 373 U. S. 284, 286.

Petitioner's conduct, which consisted of making statements to a police officer and attempting to go into Newberry's store, is certainly not evidence of standing or loitering after being requested to move or of failing to comply with the lawful order of a policeman. To convict petitioner

on no evidence of substantial elements of the crime with which he was charged is a violation of due process. *Thompson* v. *Louisville, supra; Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Taylor* v. *Louisiana,* 370 U. S. 154; *Fields* v. *City of Fairfield,* 375 U. S. 248 (1963). And if it could somehow be assumed that these acts were criminal, they were not charged. It is equally a violation of due process to convict a man of a crime not charged. *DeJonge* v. *Oregon,* 299 U. S. 353, 362 (1937); *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948); *Shuttlesworth* v. *City of Birmingham,* 376 U. S. 339 (1964).

But the evidence presented on behalf of the defense casts strong doubt on the version of the arrest given by the City. Moreover, none of the contradictory testimony offered by the defense was challenged by the city's attorney on cross-examination (R. 90-91; 100-101; 109; 113; 121-124; 127-128; 36). The only things agreed upon by the respective witnesses for the city and the defense were the time and place of the incident and the fact of petitioner's arrest.

Thus, the number of persons involved was disputed, being estimated by the city's witnesses as 10 to 12 (R. 18, 40, 51, 76), by the defense witnesses as no more than 4 or 5 (R. 84, 86, 90).[1] Also disputed is why the crowd collected, the city's version being that petitioner stopped and congregated with a group of 10 to 12 persons who were "just standing and listening and talking" (R. 18) while the defense testified that no persons or friends met petitioner and his companions at the corner (R. 90) and further that no crowd collected until the police officer entered

[1] In fact, Officer Byars testified that when he first saw petitioner he was in the company of only 4 or 5 other persons and he did not know "where the additional people . . . came from" (R. 40). But his fellow officer, Hallman, testified that there were only 5 or 6 people in the group talking to Byars (R. 62).

the picture (R. 99). Whether the crowd was all Negro (R. 51) or composed of whites and Negroes (R. 99, 106) was also at issue as was the length of time during which the incident occurred, Officer Byars having testified that he stood inside the entrance door to Newberry's watching petitioner and his companions assembled on the corner "for a minute to a minute and a half" (R. 18) and spent another "minute or minute and a half talking to them outside trying to encourage them to move" (R. 34) while petitioner and the other defense witnesses testified that they were accosted by Officer Byars while in motion approaching the corner and did not stop and stand on the corner (R. 91, 110, 116, 131-132) and thus the entire arrest incident took less than a minute (R. 118, 133). Also directly challenged by the defense evidence was the testimony of the primary arresting officer that he spoke to the allegedly assembled crowd three times requesting them to move on (R. 19); the witnesses for the defense testified uniformly that Officer Byars emerged from Newberry's store and placed himself directly in front of petitioner and said to him once only and to no one else "Move on" (R. 94, 104, 106, 110, 115). Whether petitioner was placed under arrest before entering the store was also disputed as Byars testified that Shuttlesworth was arrested before he moved (R. 21) while petitioner (R. 121) and others (R. 97, 109) testified that he was not placed under arrest until he started into the store.

In addition, Byars testified on direct examination that petitioner's group was standing in the western half of the western crosswalk of 2nd Avenue and 19th Street North (R. 18) and that as he was observing them from the inside of Newberry's store "on some occasions people who were walking in an easterly direction on the north side of 2nd Avenue had to go into the street to get around the people who were standing there" (R. 18). But on cross-examina-

tion the defense counsel diagrammed the scene on a blackboard (R. 21) and Officer Byars drew an X to mark the spot where petitioner's group was allegedly congregated (R. 22). He then testified as follows:

> Q. I saw (sic) assuming the defendants were standing where you drew that little mark there, that would have left more than half of this north-south crosswalk free, would it not? A. That is true.
>
> Q. And they didn't block the east-west crosswalk at all did they? A. They did not (R. 22-23).

These discrepancies were glossed over completely by the Alabama Court of Appeals but the record taken as a whole makes it clear that the version of the facts given by the witnesses for the defense is the correct version. In any event, petitioner need not rely on his own evidence, though it demonstrates how specious were the charges against him. Even under the state's version he was guilty of no crime. See pp. 12 to 13, *supra*.

The record moreover supports an inference that the real reason for petitioner's arrest and conviction was his civil rights activities in the City of Birmingham. At the time of his arrest there was a selective buying campaign going on in Birmingham on the part of the Negro community (R. 25, 66, 81, 125, 136). Defense counsel attempted to show that petitioner's arrest was part of a police tactic of harassment in retaliation for his course of civil rights conduct which had resulted in numerous other arrests by the Birmingham Police Department (R. 25, 48, 80, 118, 119). The Circuit Court sustained the City's objections to this line of questioning (R. 119) and the Court of Appeals affirmed (R. 146). However, the only plausible explanation of this conviction on no evidence is that it was part of a campaign of harassment against him for his civil

rights activities (R. 48). This should be considered with petitioner's many arrests by the Birmingham police over a number of years (R. 48)[1] and the number of occasions that these arrests and subsequent convictions have been brought to this court.[2] Only in this context does such a baseless prosecution make sense.

II

Petitioner's conviction was secured under ordinances which as applied to his conduct are unconstitutionally vague.

As demonstrated in I, *supra*, what caused petitioner's arrest on this occasion (aside from his civil rights activities) was that he "talked back" to the officer by asking him (taking the City's evidence as a true version of the events that transpired) "do you mean to tell me that we can't stand here in front of this store" (R. 19) and then attempted to enter Newberry's store when ordered to move

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[1] 1958: (1) Reckless driving; 2) Consipiring to commit a breach of the peace; 3) Inciting a violation of disorderly conduct ordinance)
1960: (1) Speeding; 2) Aiding and abetting law violation; 3) Giving false information to officer)
1961: (1)Violation of peace bond ordinance; 2) Refusing to obey lawful command of officer and interfering with officer in discharge of duty)
1962: (Loitering after warning and failing to obey officer (this case))
1963: (1) Parading without a permit; 2) Parading without a permit)

[2] *Shuttlesworth* v. *City of Birmingham*, cert. den. 368 U. S. 959 (1962) (Conviction for disorderly conduct); *Ex Parte Shuttlesworth*, 369 U. S. 35 (1962) (Application for writ of habeas corpus after affirmance of conviction of disorderly conduct); *Shuttlesworth* v. *City of Birmingham*, 373 U. S. 262 (1963) (Conviction for aiding and abetting violation of trespass ordinance); *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339 (1964) (Conviction of interfering with officer in discharge of his duty affirmed by Ala. Court of Appeals on basis of City's assault ordinance).

on. But petitioner was charged under two ordinances, one of which makes it a crime to stand or loiter upon a street after being told to move (Section 1142) the other of which makes it a crime not to comply with a lawful order of a police officer (Section 1231).[4]

Petitioner could not know that (1) asking a question and (2) going into the store amounted to standing or loitering after an order to move, the conduct interdicted by Section 1142 or failing to obey the lawful command of an officer, the conduct proscribed by Section 1231. Petitioner, therefore, was not given adequate prior warning by the language of either of these ordinances that his peaceful inquiry or his entering the store was a violation of their terms. Thus his conviction under these ordinances is contrary to prior decisions of this court, *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U. S. 459 (1939); *Wright* v. *Georgia*, 373 U. S. 284 (1963); *Bouie* v. *City of Columbia*, —— U. S. ——, 12 L. Ed. 2d 894 (1964). See also *Thompson* v. *Louisiana*, 362 U. S. 199, 206 citing *Lanzetta, supra.* Indeed, the *Thompson* case contains elements of both the "no evidence" and "lack of fair warning" aspects of procedural due process in that the defendant there made peaceful inquiry of the arresting officer as to what was wrong with his conduct and was charged and convicted under an ordinance that did not apprise him

[4] The validity of such ordinances restricting as they do the right to make peaceful and ordinary use of the public streets is open to question. See *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666 (1950). This is particularly true where the ordinances contain no guides to limit police action which "often reflect(s) affront to the policeman's personal sensibilities rather than vindication of the public interest." American Law Institute, *Model Penal Code, Tentative Draft No.* 13, p. 14. See also Douglas, "Vagrancy and Arrest on Suspicion," 70 Yale L. J. 1 (1960).

of the fact that what he was shown to have been doing came within the ambit of its proscription.

With particular regard to Section 1231 of the City Code, its inapplicability to defendant's conduct is demonstrated by the Alabama Court of Appeals' opinion in the companion case of *Phifer* v. *City of Birmingham*, 160 So. 2d 898. In reversing Rev. Phifer's conviction, the Court stated:

> "The charge in the second count of the complaint is for a violation of Section 1231, of the General City Code of Birmingham. This section appears in the chapter regulating vehicular traffic and provides for the enforcement of the orders of the officers of the police department in directing such traffic. There is no suggestion in the evidence that the defendant violated any traffic regulation of the city by his refusal to move away from Shuttlesworth when ordered to do so." 160 So. 2d at 901.

Likewise, there is no evidence that petitioner violated any traffic regulation of the City by making peaceful inquiry of the officer and attempting to enter Newberry's store. Thus, the application of Section 1231 to petitioner's conduct to sustain his conviction requires that that conviction be voided for unconstitutional vagueness. Certiorari should be granted because petitioner was convicted under ordinances which, as shown by the proof, had nothing to do with his conduct which was at all times peaceful and lawful.

CONCLUSION

This case is another instance of petitioner's unfair treatment by state authority because of his civil rights activities in Birmingham. That he could be arrested, brought to trial and convicted on the basis of what is shown on this record is incredible and denies fundamental precepts of due process required by the Fourteenth Amendment. Such a conviction should not be permitted to stand.

It is therefore, respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
NORMAN AMAKER
10 Columbus Circle
New York, New York 10019

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue, North
Birmingham, Alabama

Attorneys for Petitioner

APPENDIX

Opinion of the Alabama Court of Appeals

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1963-64

6 Div. 929

F. L. SHUTTLESWORTH,

—v.—

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

PER CURIAM:

Appellant, Fred L. Shuttlesworth, appeals from a conviction by the Circuit Court of Jefferson County, Alabama, of violating Sections 1142 and 1231 of the General City Code of Birmingham, Alabama. The case was heard by the Circuit Judge sitting without a jury. The first count of the complaint charges the appellant with loitering on a street corner with others so as to obstruct free passage along the sidewalk. The other count charges appellant with failure to obey the lawful command of a police officer.

Section 1142 of the General City Code of Birmingham, Street and Sidewalks to Be Kept Open For Free Passage, reads:

> "Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the city with any animal

or vehicle, or with boxes or barrels, glass, trash, rubbish or display of wares, merchandise or sidewalk signs, or other like things, so as to obstruct the free passage of persons on such street or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.

"It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on."

Section 1231 of the General City Code of Birmingham, Obedience to Police, reads as follows:

"It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

The evidence, as introduced by the City, tended to show that the defendant was a member of a crowd of about ten or twelve people standing on the corner of 19th Street and 2nd Avenue, North, in the City of Birmingham, and that this crowd was blocking the sidewalk to such an extent that some of the other pedestrians were forced to walk into the street to get around them. The crowd was accosted by one Officer Byars and asked to clear the sidewalk so as not to obstruct pedestrian traffic. The evidence further showed that the crowd remained and when requested to disperse for the third time by Officer Byars, defendant Shuttlesworth said, "You mean to tell me we can't stand here in front of this store?" at which time Officer Byars informed the defendant that he was under arrest. Officer Byars testified that

at the time of the arrest everyone had moved or was moving away except Shuttlesworth. After being told that he was under arrest, Shuttlesworth moved away saying, "Well I will go into the store." Officer Byars then followed Shuttlesworth into Newberry's Department Store and took him into custody.

The appellant's first two assignments of error addressed to the action of the lower court in overruling appellant's motion to Quash and Demurrers to the complaint were overruled on the authority of *Phifer* v. *City of Birmingham*, 6 Div. 930, Ct. of Appeals Manuscript, which case was combined and tried with this one.

The third assignment of error presented by appellant is that the Court erred in denying and overruling the defendant's motion to exclude the testimony and for judgment. When there is sufficient evidence on the part of the prosecution to make out a prima facie case, a motion to exclude the evidence should be overruled. *Drummond* v. *State*, 37 Ala. App. 308, 67 So. 2d 280.

Appellant's fourth assignment of error was that the court erred in denying and overruling defendant's motion for a new trial. All the grounds set out and argued in appellant's motion for new trial, except ground 11, were grounds of a general nature and were properly overruled as sufficient evidence was introduced for the court to find the defendant guilty under the complaint.

The 11th ground of appellant's motion for a new trial is the same as his fifth assignment of error and reads:

> "The court erred in sustaining the objections by the City of Birmingham as to reasons for the arrest and conviction of the appellant, especially regarding his civil rights activities."

The following objections and rulings of the court thereon are alleged to be error by the appellant:

"Q. There was a trial then pending in the Federal Court, is that correct? A. That's right, my release from jail.

"Q. Release from jail? What were the circumstances of your being in there?

"Mr. Walker: We object, Your Honor. That has no bearing on this case.

"Mr. Hall: If Your Honor, please, we insist it is very pertinent. It goes to our theory the reason for the arrest and the heavy penalty.

"Mr. Walker: Your Honor, this is getting far afield from the charge.

"The Court: Sustain the objection.

"Mr. Hall: We want an exception, Your Honor.

"Q. Was there wide publicity given to this Federal hearing? A. Yes.

"Q. Had it been published in the newspapers? A. It had.

"Q. Was there publicity over the radio and by way of the television?

"Mr. Walker: We object to this.

"The Court: Sustained.

"Mr. Walker: It serves no purpose.

"Mr. Hall: Exception, Your Honor.

"Q. How many times have you been arrested by the police of the City of Birmingham because of your civil rights activities?

"Mr. Walker: We object, your Honor. Immaterial.

"The Court: Sustained.

"Mr. Hall: We except, Your Honor."

• • • • •

"Q. Why was it necessary for you to leave 19th Street and 2nd Avenue and go to 16th Street and 5th Avenue to get a cup of coffee?

"Mr. Walker: We object to that, Your Honor, why.

"Mr. Hall: Mr. Walker brought it out on cross-examination. He made a big show of the distance.

"The Court: Leave it out.

"Mr. Hall: We want an exception, Your Honor."

The sustaining of the objections to the foregoing questions was proper as such questions were irrelevant and immaterial to the issues involved.

The trial court, therefore, did not err by sustaining such objections.

The judgment of the Circuit Court is

Affirmed.

Order and Judgment of the Alabama Court of Appeals

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1964

6 Div. 929

F. L. SHUTTLESWORTH,

—v.—

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

January 25, 1963

Transcript Filed

April 18, 1963

Come the parties by attorneys, and submit this cause on briefs for decision.

November 19, 1963

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant pay the cost of appeal of this court and of the Circuit Court.

Order of Alabama Court of Appeals Denying Rehearing

January 7, 1964

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam.

Orders of the Supreme Court of Alabama

THE SUPREME COURT OF ALABAMA

Thursday, February 20, 1964

The Court Met Pursuant to Adjournment

Present: All the Justices

6th Div. 65

Ex Parte: Fred L. Shuttlesworth

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court

Come the parties by attorneys and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court, it is considered and ordered that the Writ be and the same is hereby denied and the petition dismissed at the cost of the petitioner, for which costs let execution issue accordingly.

No Opinion.

Thursday, March 26, 1964

THE SUPREME COURT OF ALABAMA

Thursday, March 26, 1963

The Court Met Pursuant to Adjournment

Present: All the Justices

6th Div. 65

Ex Parte: Fred L. Shuttlesworth

PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS

(Re: Fred L. Shuttlesworth vs. City of Birmingham)

Jefferson Circuit Court

IT IS ORDERED that the application for rehearing filed in the above styled cause on March 6, 1964, be and the same is hereby overruled.

INDEX.

	Page
Citation to opinion below	1
Statement in opposition to jurisdiction of the Court	1
Statement	2
Statement in opposition to questions presented	4
Constitutional and statutory provisions involved	4
Argument	5

Cases Cited.

Bouie v. Columbia, ... U. S. ..., 12 L. Ed. 894 (1964)	15, 16
Drummond v. State, 37 Ala. App. 308, 67 So. 2nd 280	6
Garner v. State of Louisiana, 82 Sup. Ct. 248, 368 U. S. 157	14
Inland Power and Light Company v. Grieger, 91 F. 2d 811	6
Phifer v. City of Birmingham, ... Alabama App. ..., 160 So. 2d 898	12, 14, 15, 16
Philyaw v. City of Birmingham, 36 Ala. App. 112, 54 So. 2d 619	15
State v. Lucas, Miss., 221 Miss. 538, 73 So. 2d 158	8
State v. Taylor, 119 A. 2d 36, 38 N. J. Super. 6	11

Statutes Cited.

Constitution of the United States, Fourteenth Amendment	4, 6

General City Code of Birmingham:
Section 1142 .....2, 4, 5, 8, 13
Section 1230 .....4, 16
Section 1231 .....2, 4, 5, 8, 12, 13, 14, 15, 16

Textbooks Cited.

27 A. Jur. Section 57, p. 623 13
22 Corpus Juris Secundum, Section 24 (2), p. 67 14

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM,
Respondent.

On Writ of Certiorari to the Court of Appeals of Alabama.

BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

CITATION TO OPINION BELOW.

The opinion of the Alabama Court of Appeals is reported at ... Ala. App. ..., 161 So. 2d 796, and is set forth in the appendix to petitioner's brief and application for writ of certiorari at appendix page 1a.

STATEMENT IN OPPOSITION TO JURISDICTION OF THE COURT.

Petitioner has not been deprived of rights, privileges, and immunities secured by the Constitution of the United States.

STATEMENT.

As set forth in petitioner's statement (p. 4), the petitioner was charged and convicted below for violation of Sections 1142 (as amended by Ordinance No. 1436-F) and 1231 of the General City Code of Birmingham.

The complaint charging petitioner was framed in two counts as set out in petitioner's statement (p. 4). Count one complained that the petitioner, as part of a group, blocked the free passage over a sidewalk in the City of Birmingham. Count Two complained that the petitioner failed to obey a lawful order, signal or direction of a police officer.

The following facts were established by the evidence introduced in the trial court. On April 4, 1962, at about 10:30 A. M., Officer Robert E. Byars, Jr., observed the petitioner, along with James Phifer and three or four other people walking South on 19th Street toward 2nd Avenue, North, Birmingham, Alabama (R. 17, 20). Officer Byars then entered Newberry's Department Store at its alley entrance and walked to the front of the store at 19th Street and 2nd Avenue (R. 17, 18). When he got to the front entrance he saw the petitioner standing in a group of ten or twelve people (R. 18, 28, 40). They were on the Northwest corner of 2nd Avenue and 19th Street (R. 18, 28, 40). The group was standing, listening and talking (R. 18). The traffic light changed a number of times while they stood there at the intersection (R. 38). The group blocked pedestrian traffic to such an extent that some people walking east on the north side of 2nd Avenue had to walk into the street to get around the group (R. 18, 21, 29). Petitioner was a member of the group (R. 18, 28, 35, 42, 51, 61, 62, 76). Officer Byars watched the group for a minute to a minute and a half (R. 19, 28, 29). Officer Byars then walked up to the group and informed them they would have to move on and clear the sidewalk

so as to allow free passage and not obstruct pedestrian traffic (R. 19, 28, 29). A small number in the group moved but that was all. Petitioner did not move (R. 19, 42, 51, 62, 76). After a short while, the officer informed the group a second time they would have to move and not obstruct the sidewalk in order to permit pedestrian traffic to move unhampered (R. 19). Petitioner and some others in the group did not move and petitioner stated: "You mean to say we can't stand here on the sidewalk?" (R. 19, 30). Officer Byars did not do or say anything for a short period and then he told the group that he was telling them the third and last time to move or they would be arrested for obstructing the sidewalk (R. 19, 30, 62). Petitioner was still in the group (R. 19, 30, 35, 42, 51, 61, 62, 76). There was still some eight to twelve people in the group when told to move the third time (R. 19, 30, 35, 42, 51, 61, 62, 76). Petitioner did not move but made the statement: "You mean to tell me we can't stand here in front of this store?" (R. 19). Officer Byars then informed petitioner that he was under arrest, after which time petitioner moved away saying: "Well, I will go into the store" (R. 19, 21, 43, 54). At this time the rest of the group began moving away (R. 54). Officer Byars followed petitioner into Newberry's Store and took him into custody (R. 19, 20). Petitioner asserts in his statement that James Phifer was arrested simultaneously with Shuttlesworth, but this is not so. The circumstances of James Phifer's arrest are as follows: After taking Shuttlesworth into custody, Officer Byars took him to the west curb to await transportation to city jail (R. 20, 34). While awaiting the transportation James Phifer walked up and began talking to the petitioner (R. 20, 34). He was told that petitioner was under arrest and that he could not talk to him. He was instructed three times to move away from petitioner before he was arrested (R. 20, 34). Obviously the Alabama Court of Appeals found from the evidence that James Phifer was not arrested for

obstructing the sidewalk, but for talking to petitioner, and failing to leave when so instructed. Under the circumstances, it is clear that no traffic situation existed at that time and therefore no violation was established under either Section 1142 as amended or Section 1231.

STATEMENT IN OPPOSITION TO QUESTIONS PRESENTED.

1. Petitioner was convicted on a record containing ample evidence of his guilt and therefore was not denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

2. Petitioner was convicted under ordinances which as applied to his conduct were not unconstitutionally vague under the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to the ordinances set out in Petitioner's application this case also involves Section 1230 of the General City Code of Birmingham:

Police to direct traffic; directing in event of fire or emergency.—It shall be the duty of the police department to enforce the provisions of this chapter. Officers of the Police Department are hereby authorized to direct all traffic either in person or by means of visible or audible signal or sign in conformance with the provisions of this chapter; provided, that in the event of a fire or other emergency or to expedite traffic or safeguard pedestrians, officers of the police or fire department may direct traffic, as conditions may require, notwithstanding the provisions of this chapter.

Section 1230 is involved in this case because when it is construed in pari materia with Section 1231, it limits or restricts the scope of Section 1231 to traffic situations.

ARGUMENT.

Petitioner, Fred L. Shuttlesworth was convicted of violating Sections 1142 and 1231 of the General City Code of Birmingham, Alabama.

Section 1142 of the General City Code of Birmingham, Streets and Sidewalks to be kept open for free passage reads:

> "Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the City with any animal or vehicle, or with boxes or barrels, glass, trash, rubbish or display of wares, merchandise or sidewalk signs, or other like things, so as to obstruct the free passage of persons on such street or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.
>
> "It shall be unlawful for any person or any number of persons to so stand, loiter, or walk upon any street or sidewalk in the City as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the City after having been requested by any police officer to move on."

Section 1231 of the General City Code of Birmingham, Obedience to Police, reads as follows:

> "It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

There are only two questions which petitioner contends are presented to this Court for review. Petitioner's questions are stated as follows:

"1. Whether petitioner was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States by his conviction on a record containing no evidence of his guilt.

"2. Whether petitioner was also denied due process of law by his conviction under ordinances which as applied to his conduct are unconstitutionally vague, under the Fourteenth Amendment."

First Question.

Let us now determine whether or not there was sufficient evidence to justify petitioner's conviction and afford him his full rights under the "due process" clause of the Fourteenth Amendment.

It may well be that a defendant is protected by the Constitution from conviction on a record without any evidence of guilt. This is not the case here. The evidence in this case is overwhelmingly in support of the trial court verdict. Appellant raised this question in the Circuit Court by a motion to exclude the evidence. He assigned its overruling as error. Naturally, a motion to exclude the evidence will not lie if there is sufficient evidence to support conviction. The rule in this regard in Alabama is that no error results from the overruling of a motion to exclude where the evidence presents a question for the jury and is sufficient to sustain conviction. **Drummond v. State**, 37 Ala. App. 308, 67 So. 2nd 280. A similar rule is expressed in **Inland Power and Light Company v. Grieger**, 91 F. 2d 811, where we find:

"In considering the evidence, we must consider only that which is most favorable to Appellees, with every inference of fact that might be drawn from it. Maryland Casualty Co. v. Jones, 279 U. S. 792, 49 S. Ct. 484, 73 L. Ed. 960."

It is clear that both the Alabama rule in regard to "motions to exclude the evidence" and the Federal rule

in regard to the consideration of the evidence and the inferences to be drawn therefrom, are simply giving recognition to the fact that the trial judge is in a much better position to weigh and evaluate contradictory testimony. The Appellate Courts are simply not in a position to fairly make such a determination; and consequently, the foregoing rules were formulated to place this burden where it logically belongs.

Seldom is a record presented to this honorable court or any other Appellate Court that does not contain contradictory evidence as to distances, number of persons involved or other matters not mentally noted when observed. In this case the evidence, although possibly disputed, shows the petitioner was standing in a group of ten or twelve people (R. 18, 28, 40), that they stood on the corner of 2nd Avenue and 19th Street (R. 18, 28, 40) through several changes in the traffic light (R. 38), and that the group, including petitioner, blocked the sidewalk to such an extent that other pedestrians using the sidewalk had to walk out into the street in order to get around the group (R. 18, 21, 29). Officer Byars watched the group for a minute to a minute and one-half (R. 19, 28, 29) and then walked up to the group and informed them they were blocking the sidewalk and to move (R. 19, 28, 29). After a short while Officer Byars told the group a second time they would have to move (R. 19). Petitioner and others in the group failed to move (R. 19, 30). A short time later Officer Byars told petitioner and his group a third time to move and upon petitioner's failure to comply he was arrested (R. 19). There were still eight to twelve persons in the group when told the third time to move (R. 19, 30, 35, 42, 51, 61, 62, 76). Petitioner did not move after being told the third time that the sidewalk was blocked, but indicated a determination not to move by stating: "You mean to tell me we can't stand here in front of this store?" (R. 19). At this time Officer Byars arrested petitioner (R. 19).

Section 1142 as amended and Section 1231 have been set out earlier in this brief. Since the evidence must also be sufficient under the counts charging the violations, we shall consider the evidence in light of the complaint.

Count One is essentially as follows:

> "Comes the City of Birmingham . . . and complains that F. L. Shuttlesworth, . . . did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk . . . or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on . . ."

It is clear that under count one of the complaint the evidence was sufficient.

Petitioner in his brief does raise one other proposition which should be discussed. He argues that there was no obstruction as contemplated by Section 1142 as amended. In order to properly define the term "obstruct" as used in Section 1142 as amended, the Court should first determine the objects of the statute and then direct its definition of the term toward those ends. **State v. Lucas**, Miss., 221 Miss. 538, 73 So. 2d 158. In the light of this rule, it is clear that "obstruct" does not mean a total or complete blocking of the sidewalk. This is apparent from the language used in the ordinance as well as the objects sought to be attained by this regulation. The term "obstruct free passage" definitely contemplates something less than a total or complete blocking of pedestrian traffic. All that is required is that the "free passage" of pedestrians be hindered or impeded. The object of the regulation is to permit freedom of travel to pedestrians walking along the sidewalk.

Obviously no complete blocking of pedestrian traffic is contemplated. Even where large crowds gather to listen

to speeches there is no complete blocking of movement. It is possible at the largest of these assemblages to squeeze through the crowd. Clearly the word "obstruct" in the context in which it is used and the object sought to be attained means no more than to hinder or impede the passage of persons on the sidewalk. If the term "free" as used in "free passage" has any meaning at all it must be construed so as to limit the term "obstruct" as indicated.

Petitioner sets out a portion of the testimony, contending it establishes that there was no obstruction. The portion of the testimony set out by petitioner does not even support an inference that there was no obstruction of passage. In fact, if we enlarge just slightly upon the portion of the record set out in petitioner's brief, we find it completely inconclusive of anything.

"Q. Now, Mr. Byars, they were standing about where you drew that little x mark?

A. That is where the defendant, Shuttlesworth, was.

Q. Well, we are only concerned with these defendants, Mr. Byars. We don't know what other persons made up the crowd.

A. Would you restate the question?

Q. I saw (six) assuming the defendants were standing where you drew that little mark there, that would have left more than half of your north-south cross-walk free, would it not?

A. That is true.

Q. And they didn't block the east-west cross-walk at all, did they?

A. They did not" (R. 22, 23).

From the foregoing it is uncertain whether the witness was just describing that portion of the sidewalk blocked by the petitioner and James Phifer or the entire group. Petitioner and Phifer were the only ones on trial and it

is quite likely the witness was telling about the portion of sidewalk blocked by these two persons, exclusive of the crowd. This seems the only logical conclusion in light of counsel's statement to the witness: "Well, we are only concerned with these defendants, Mr. Byars. We don't know what other persons made up the crowd."

A. In the case before this Honorable Court it was not essential that petitioner, by himself constitute an obstruction. If his conduct in unison with that of his companions caused an obstruction, then he was guilty. It will be noted that the second paragraph of Section 1142 as amended specifically covers such a situation:

> "It shall be unlawful for any person or any number of persons to so stand, loiter, or walk upon any street or sidewalk in the City as to obstruct free passage over, on or along said street or sidewalk. . . ."

It is clear under the terms of the ordinance that the petitioner could not stand or loiter with his companions so as to obstruct the free passage of pedestrians without being in violation of Section 1142 as amended. The evidence is clear that petitioner was a member of a group that was standing and listening and talking (R. 19). It is equally clear that petitioner considered himself a part of this group because when told to move on the second occasion petitioner stated: "You mean to say we can't stand here on the sidewalk" (R. 19, 30)? Common sense and logic dictate that this police officer, after observing this group for about one and one-half minutes, could tell that petitioner's group was all together. The only other conclusion that could be drawn is that those persons allegedly not in the group were either themselves obstructed by petitioner's group or had stopped to listen to them talk. In either event the conclusion is inescapable that petitioner was in violation of Section 1142 as amended.

Let us now turn to count two of the complaint to see if the evidence presented is sufficient under this count. Count Two is essentially as follows:

> "Comes the City of Birmingham . . . and complains that F. L. Shuttlesworth . . . did refuse to comply with a lawful order, signal or direction of a police officer . . ."

The "lawful order, signal or direction" in this case directed the petitioner to "move on". Under the circumstances existing at the time of the order, it was certainly lawful.

The general scope and authority of a police officer in giving orders in the performance of his duty was discussed in **State v. Taylor**, 119 A. 2d 36, 38 N. J. Super. 6, in the following language:

> ". . . The duty of police officers, it is true, is 'not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In performance of their duties they may give reasonable directions.' People v. Nixon, 248 N. Y. 182, 188, 161 N. E. 463, 466. Then they are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty. The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace." People v. Galpern, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785 (Ct. App. 1932).
>
> "Failure to obey a police order to 'move on' can be justified only where the circumstances show conclu-

sively that the order was purely arbitrary and was not calculated in any way to promote the public order. As was said in the Galpern case, the courts cannot weigh opposing considerations as to the wisdom of a police officer's directions when he is called upon to decide whether the time has come in which some directions are called for."

The evidence in this case revealed that petitioner and his group not only obstructed the sidewalk, but obstructed it to such an extent that people using the sidewalk had to walk out into the street to get around the group. Petitioner's conduct was such as to cause an interference with vehicular traffic as well as pedestrian traffic, and was well within any limitation imposed by virtue of Section 1231 being located in the Chapter of the City Code titled "Traffic". **Phifer v. City of Birmingham**, ... Alabama App. ..., 160 So. 2d 898.

Under his first question petitioner argues that the real reason for his arrest was because of his civil rights activities in the City of Birmingham. He implies that he was unable to put into evidence the fact that there was a selective buying campaign going on in Birmingham on the part of the Negro community. It is immaterial whether the sustaining of an objection to such evidence would be error because the fact of a selective buying campaign was introduced into evidence as shown at pages 25, 26, 66, 81, 125 and 136 of the transcript. Petitioner cannot complain of any error in this regard because his questions were answered and these answers were considered by the court.

Not only was petitioner not arrested for his civil rights activities, but it can logically be argued that because of his civil rights activities, he actively sought arrest to further those same ends. In other words he had a better motive to seek arrest than did the traffic officer who ar-

rested him. Each time petitioner has been arrested for any offense, it can reasonably be contended that it enhanced and increased his prestige in all his civil rights activities, and quite likely increased his potential for acquiring contributions to support these activities.

Second Question.

Petitioner's second point or question is equally without merit. He contends that Sections 1231 and 1142 as amended are vague in their application to his conduct; and consequently, deprive him of rights protected by the Fourteenth Amendment.

If, as contended by petitioner, his only offenses were talking back to the officer and taking part in Civil Rights activities, then clearly the application of these ordinances to his conduct would be unconstitutional. The facts just don't bear this out. By coincidence, as the record shows, the petitioner did talk back to the officer at the same time he was committing the offense charged. Actually the evidence discloses the petitioner was told to move three times and three times he failed to move, thus violating Sections 1231 and 1142 as amended three times.

The petitioner was not convicted on an ordinance that as applied to his conduct was vague and uncertain. The defendant has a substantive right:

> ". . . to be informed by the indictment or information in simple, understandable language of the crime he is charged with and the acts constituting the crime, in sufficient detail to enable him to prepare his defense and to be protected in the event of double jeopardy." 27 A. Jur., Section 57, p. 623.

In the instant case the complaint based upon the two ordinances sufficiently inform the petitioner of the nature of the crime and the acts he is charged with having committed in sufficient detail and manner for him to prepare

his defense and be protected from another prosecution for the same offense.

A good discussion of the certainty required of the language employed in statutes is found in 22 Corpus Juris Secundum, Section 24 (2) at page 67:

> "In determining whether a statute meets the requirement of certainty, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Absolute certainty is not required in a criminal statute, and the standards of guilt proscribed therein need not be so precise as to be capable of reduction to an exact mathematical formula or of mechanical application . . ., and a standard of conduct under statute need not be defined with such precision that those affected by it will never be required to have to hazard their freedom on correctly foreseeing the manner in which a matter of degree may be resolved by a jury . . ."

Any doubt, if there ever was any, concerning the certainty of Section 1231 was removed by the limitation placed on this section by virtue of its location in that chapter of the City Code entitled "Traffic". **Phifer v. City of Birmingham,** ... Ala. App. ..., 160 So. 2d 898. As noted in **Garner v. State of Louisiana,** 82 Sup. Ct. 248, 368 U. S. 157:

> "Whether state statutes are to be construed one way or another is a question of state law, final decision of which rests, of course, with the Courts of the State."

Under the construction placed on Section 1231 by the Appellate Court in Alabama, there is no basis left upon which to argue the vagueness and uncertainty of that section. **Phifer v. City of Birmingham,** ... Ala. App. ..., 160 So. 2d 898.

Petitioner also contends at least inferentially, that when the Alabama Court of Appeals restricted the scope of Section 1231 to traffic situations, it made its application unconstitutional as to petitioner. He implies that under authority of **Bouie v. Columbia,** ... U. S. ..., 12 L. Ed. 894 (1964), the limitation thus placed on Section 1231 was unforeseeable and therefore deprived petitioner of fair warning contrary to the "due process" clause of the United States Constitution. There is no comfort for petitioner in that case. The Court in the **Bouie case** held that the judicial enlargement of an ordinance violated the due process clause of the Constitution, and also by way of dicta held that the unforeseeable limitation by judicial construction of a vague or broad statute also failed to give fair warning and was thus a denial of due process. Your respondent submits that this statute is not and never has been subject to criticism for being vague or too broad. If Section 1231 as presently written had appeared in Chapter 35 of the City Code dealing with "Offenses—Miscellaneous", it would not have been restricted to traffic situations and would not have been so broad as to be vague. Respondent also insists that the rule of construction applied in the **Phifer case** is completely consistent with the prior decisions of the Alabama Appellate Courts and was easily foreseeable. In the case of **Philyaw v. City of Birmingham**, 36 Ala. App. 112, 54 So. 2d 619, we find the following statement of the same rule:

> "All City ordinances appearing in the same chapter of a city code are in pari materia, and must be construed together and, if possible, be interpreted so as to be in harmony. Sloss-Sheffield Steel and Iron Co. v. Allred, 247 Ala. 499, 25 So. 2d 179."

Section 1231 appears in Chapter 51 of the General Code and is entitled "Traffic." All sections in this chapter relate in some manner to traffic. The section immediately

preceding Section 1231 when construed with said section does a great deal to clarify the restriction imposed in the **Phifer case.**

> "Section 1230. **Police to direct traffic; directing in event of fire or emergency.**
>
> "It shall be the duty of the police department to enforce the provisions of this chapter. Officers of the police department are hereby authorized to direct **all traffic** either in person or by means of visible or audible signal or sign in conformance with the provisions of this chapter; provided that in the event of a fire or other emergency or **to expedite traffic or safeguard pedestrians,** officers of the police or fire department may direct traffic, as conditions may require, notwithstanding the provisions of this chapter."

It is clear when section 1231 is construed in pari materia with section 1230 and all the other sections appearing in this chapter, that it is limited to traffic situations. It is equally clear that such a traffic situation existed in this instance because pedestrians were compelled to leave the sidewalk and walk out into the street to get around petitioner and his group.

As observed in **Bouie v. Columbia,** supra, the rule petitioner seeks to invoke, is limited to an unforeseeable rule of construction which limits or restricts an otherwise vague enactment:

> "The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question . . . The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we

think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitled him. In both situations, 'a federal right turns upon the status of state law as of a given moment in the past—or, more exactly, the appearance to the individual of the status of state law as of that moment . . .' "

In this case, the petitioner was given fair warning. The construction limiting section 1231 to traffic situations is supported by the prior decisions of the State of Alabama, and the application of this ordinance in this manner was clearly foreseeable by petitioner.

Respondent respectfully submits that the opinion of the Court of Appeals of Alabama is correct in all respects and that Petitioner's application for writ of certiorari should be denied.

.....

W. C. WALKER,

.....

EARL McBEE,

Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 5

FRED L. SHUTTLESWORTH,

Petitioner,

—v.—

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
10 Columbus Circle
New York, New York 10019

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Attorneys for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Questions Presented 3

Statement of the Case 4

Summary of Argument 12

ARGUMENT:

I. Since the Verdict Against Petitioner Was General, His Conviction Must Be Reversed if Any of the Charges Is Constitutionally Invalid 13

II. On Its Face, and as Applied to Petitioner's Conduct, Section 1142's Proscription of Standing or Loitering on a Sidewalk After a Police Order to Move on Is Vague and Overbroad in Violation of the First and Fourteenth Amendments 14

A. The ordinance as written is vague and overbroad 14

B. The construction of §1142 by the Alabama courts has not cured its objectionable vagueness and overbreadth 20

PAGE

III. On Its Face, and as Applied to Petitioner's Conduct, Section 1142's Proscription of Standing, Loitering or Walking on a Sidewalk so as to Obstruct Free Passage Thereon Is Vague and Overbroad in Violation of the First and Fourteenth Amendments 29

IV. Petitioner's Conviction for Violation of §1231 Is Supported by No Evidence 29

CONCLUSION 31

Table of Cases

Anderson v. Albany, 321 F. 2d 649 (5th Cir. 1963) 16
Aptheker v. Secretary of State, 378 U. S. 500 (1964) 24

Baggett v. Bullitt, 377 U. S. 360 (1964) 17
Bantam Books, Inc. v. Sullivan, 372 U. S. 58 (1963) 17
Barr v. City of Columbia, 378 U. S. 146 (1964) 15, 30
Benson v. City of Norfolk, 163 Va. 1037, 177 S. E. 222 (1934) 26
Bouie v. City of Columbia, 378 U. S. 347 (1964) 23

Cantwell v. Connecticut, 310 U. S. 296 (1940) 15
Carlson v. California, 310 U. S. 106 (1940) 18, 25
City of Akron v. Effland, 112 Ohio App. 15, 174 N. E. 2d 285 (1960) 26
City of Chariton v. Fitzsimmons, 87 Iowa 226, 54 N. W. 146 (1893) 27
City of Portland v. Goodwin, 187 Ore. 409, 210 P. 2d 577 (1949) 26
City of St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30 (1908) 26

PAGE

City of Tacoma v. Roe, 190 Wash. 444, 68 P. 2d 1028 (1937) 27
Commonwealth v. Carpenter, 325 Mass. 519, 91 N. E. 2d 666 (1950) 18
Commonwealth v. Challis, 8 Pa. Super. 130 (1898) 27
Cox v. Louisiana, 379 U. S. 536 (1965) 15, 16, 18, 28
Cramp v. Board of Public Instruction, 368 U. S. 278 (1961) 17

Dombrowski v. Pfister, 380 U. S. 479 (1965) 17, 24
Dominguez v. City and County of Denver, 147 Colo. 233, 363 P. 2d 661 (1961) 26
Douglas v. Alabama, 380 U. S. 415 11

Edwards v. South Carolina, 372 U. S. 229 (1963) 15
Ex parte Bodkin, 86 Cal. App. 2d 208, 194 P. 2d 588 (1948) 27
Ex parte Mittelstaedt, 164 Tex. Crim. 115, 297 S. W. 2d 153 (1957) 26

Fields v. Fairfield, 375 U. S. 248 (1963) 30
Fields v. South Carolina, 375 U. S. 44 (1963) 25

Garner v. Louisiana, 368 U. S. 157 (1961) 16

Hague v. C. I. O., 307 U. S. 496 (1939) 15
Harris v. District of Columbia, 132 A. 2d 152 (M. C. A. D. C. 1957), rev'd on other grounds, 251 F. 2d 913 (D. C. Cir. 1958) 26
Harris v. District of Columbia, 192 A. 2d 814 (C. A. D. C. 1963) 26
Headley v. Selkowitz, 171 So. 2d 368 (Fla. 1965) 26
Henry v. City of Rock Hill, 376 U. S. 776 (1964) 25
Henry v. Mississippi, 379 U. S. 443 (1965) 11

PAGE

In re Bell, 19 Cal. 2d 488, 122 P. 2d 22 (1942) 25
In re Cregler, 56 Cal. 2d 308, 363 P. 2d 305, 14 Cal. Rptr. 289 (1961) 26
In re Huddleson, 229 A. C. A. No. 3, 721, 40 Cal. Rptr. 581 (1964) 27

Kunz v. New York, 340 U. S. 290 (1951) 15, 25

Largent v. Texas, 318 U. S. 418 (1943) 15
Lovell v. Griffin, 303 U. S. 444 (1938) 15, 23

Marsh v. Alabama, 326 U. S. 501 (1946) 15
Middlebrooks v. City of Birmingham, —— Ala. App. ——, 170 So. 2d 424 (1964), cert. denied, 170 So. 2d 424 (Ala. 1964) 21, 26, 27

N.A.A.C.P. v. Button, 371 U. S. 415 (1963) 16, 29
Niemotko v. Maryland, 340 U. S. 268 (1951) 15, 25

People v. Bell, 306 N. Y. 110, 115 N. E. 2d 821 (1953) .. 26
People v. Diaz, 4 N. Y. 2d 469, 151 N. E. 2d 871 (1958) .. 26
People v. Galpern, 259 N. Y. 279, 181 N. E. 572 (1932) 20, 21, 25
People v. Johnson, 6 N. Y. 2d 549, 161 N. E. 2d 9 (1959) 26
People v. Merolla, 9 N. Y. 2d 62, 172 N. E. 2d 541 (1961) 27
Phifer v. City of Birmingham, 42 Ala. App. 282, 160 So. 2d 898 (1963), cert. denied, 160 So. 2d 902 (Ala. 1964) 7, 11, 20, 22, 30
Phillips v. Municipal Court, 24 Cal. App. 2d 453, 75 P. 2d 548 (1938) 26

PAGE

Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579 (1889) 29

Saia v. New York, 334 U. S. 558 (1948) 15
Schneider v. State, 308 U. S. 147 (1939) 15
Shelton v. City of Birmingham, 42 Ala. App. 371, 165 So. 2d 912 (1964) 20, 21, 22
Shuttlesworth v. City of Birmingham, 42 Ala. App. 296, 161 So. 2d 796 (1964), cert. denied, 161 So. 2d 799 ..... 20, 22
Smith v. California, 361 U. S. 147 (1959) 17
Smith v. City of Birmingham, 42 Ala. App. 467, 168 So. 2d 35 (1964) 21
Soles v. City of Vidalia, 92 Ga. App. 839, 90 S. E. 2d 249 (1955) 26
Speiser v. Randall, 357 U. S. 513 (1958) 24
State v. Caez, 81 N. J. Super. 315, 195 A. 2d 496 (1963) 26
State v. Hunter, 106 N. C. 796, 11 S. E. 366 (1890) 26
State v. Salerno, 27 N. J. 289, 142 A. 2d 636 (1958) 26
State v. Starr, 57 Ariz. 270, 113 P. 2d 356 (1941) 26
State v. Sugarman, 126 Minn. 477, 148 N. W. 466 (1914) 27
State v. Taylor, 38 N. J. Super. 6, 118 A. 2d 36 (1955) 21
Staub v. Baxley, 355 U. S. 313 (1958) 15, 23
Stromberg v. California, 283 U. S. 359 (1931) 14

Taylor v. Louisiana, 370 U. S. 154 (1962) 15, 30
Territory of Hawaii v. Anduha, 48 F. 2d 171 (9th Cir. 1931) 26, 28
Thistlewood v. Trial Magistrate for Ocean City, 236 Md. 548, 204 A. 2d 688 (1964) 27
Thomas v. Collins, 323 U. S. 516 (1945) 14

PAGE

Thompson v. City of Louisville, 362 U. S. 199 (1960) 15, 18, 30
Thornhill v. Alabama, 310 U. S. 88 (1940) 16, 17, 25
Tinsley v. City of Richmond, 202 Va. 707, 119 S. E. 2d 488 (1961), app. dism'd, 368 U. S. 18 (1951) 22, 26, 28, 29
Tot v. United States, 319 U. S. 463 (1943) 24
Tucker v. Texas, 326 U. S. 517 (1946) 15

United States v. National Dairy Prods. Co., 372 U. S. 29 (1963) 17, 29

Village of Deer Park v. Schuster, 16 Ohio Ops. 485, 30 Ohio L. Abs. 466 (Ct. Com. Pls. 1940) 26

Whaley v. Cavanagh, 237 F. Supp. 900 (S. D. Cal. 1963), aff'd per curiam on opinion below, 341 F. 2d 295 (9th Cir. 1965) 27
Williams v. North Carolina, 317 U. S. 287 (1942) 14
Wright v. Georgia, 373 U. S. 284 (1963) 15

Statutes

Birmingham General City Code, §1142, as amended by Ordinance No. 1436-F 2, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 29

Birmingham General City Code, §1231 .....3, 10, 11, 13, 14, 20, 29, 30

28 United States Code, §1257(3) 2

Other Authority

Note, 109 U. Pa. L. Rev 67 (1960) 16

IN THE

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No. 5

FRED L. SHUTTLESWORTH,

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—v.—

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

BRIEF FOR PETITIONER

Opinions Below

The orders of the Supreme Court of Alabama denying the petition for writ of certiorari to the Court of Appeals (R. 146) and denying a rehearing (R. 147) are reported at 276 Ala. 707, 161 So. 2d 799 (1964). The opinion of the Court of Appeals (R. 137-41) is reported at 42 Ala. App. 296, 161 So. 2d 796 (1963). The order denying a rehearing (R. 141) is noted at 42 Ala. App. 296, 161 So. 2d 796 (1964). The judgment and sentences of the Tenth Judicial Circuit Court of Alabama are unreported (R. 10-12). The judgment and sentences of the Recorder's Court of the City of Birmingham are unreported (R. 2).

Jurisdiction

The final judgment of the Court of Appeals of Alabama, which is the order denying a rehearing, was entered on January 7, 1964 (R. 141). A petition for certiorari filed in the Supreme Court of Alabama was denied on February 20, 1964 (R. 146) and an application for rehearing was denied March 26, 1964 (R. 147). On June 19, 1964, by order of Justice Black, the time within which to file a petition for writ of certiorari was extended to August 23, 1964 (R. 148). The petition was filed August 21, 1964 and was granted March 1, 1965 (R. 149).

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below, and asserting here, deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves:

SECTION 1142 OF THE GENERAL CITY CODE OF BIRMINGHAM AS AMENDED BY ORDINANCE NO. 1436-F:

Streets and Sidewalks to be Kept Open For Free Passage.

Any person who shall obstruct any street or sidewalk or part thereof in any manner not permitted by this code or other ordinance of the City with any animal or vehicle, or with boxes or barrels, glass, trash, rubbish

or display of wares, merchandise or sidewalk signs, or other like things, so as to obstruct the free passage of persons on such streets or sidewalks or any part thereof, or who shall assemble a crowd or hold a public meeting in any street without a permit, shall, on conviction, be punished as provided in Section 4.

It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the City as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the City after having been requested by any police officer to move on.

SECTION 1231 OF THE GENERAL CITY CODE OF BIRMINGHAM:

Obedience to Police.

It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer.

Questions Presented

1. Whether, on its face and as applied to one who questions a policeman's order, an ordinance making it an offense to stand or loiter on any sidewalk in the city after having been requested by any policeman to move on is vague and overbroad in violation of the First and Fourteenth Amendments.

2. Whether, on its face and as applied to one who stands conversing on a sidewalk within a group of ten or twelve

persons—the entire group occupying one half the sidewalk—an ordinance making it an offense to so stand, loiter or walk on any sidewalk in the city as to obstruct free passage over, on or along the sidewalk is vague and overbroad in violation of the First and Fourteenth Amendments.

3. Whether, under an ordinance which has been construed as making it an offense to refuse or fail to comply with an order of a policeman relating to vehicular traffic, there is any evidence consistent with due process of law to sustain petitioner's conviction, where the only police order shown by the prosecution is a policeman's order directed to a group of pedestrians standing on a sidewalk, commanding them to disperse.

Statement of the Case

On April 4, 1962, the petitioner, Reverend Fred L. Shuttlesworth, was arrested by four or five police officers[1] at the corner of Second Avenue and 19th Street North in the City of Birmingham, Alabama. This case challenges his convictions for loitering and noncompliance with a police order on that occasion, pursuant to which he has been sentenced to 180 days imprisonment at hard labor, and an additional 61 days imprisonment at hard labor in default of

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[1] Technically, Patrolman Byars made the arrest and denied that other officers assisted him (R. 30). But Officers Hallman and Davis testified that Byars beckoned them to the scene and that they arrived prior to the arrest (R. 59, 64, 74). Officer Renshaw, who had also come up behind Byars, regarded himself as having assisted by his presence in the arrest (R. 48). Officer Allred was a short distance off at the time (R. 66-67).

fine and costs (R. 10-11). The following statement of the circumstances of his arrest is taken from the testimony of the arresting officers unless otherwise indicated; where based on uncontradicted testimony of defense witnesses, that source is noted.

On April 4, 1962, the Negro citizens of Birmingham were engaged in a boycott of the downtown department stores (R. 89, 122: uncontradicted testimony of defense witness Armstrong and of petitioner). Word of the boycott was known to the police (R. 43-44, 63, 78), including Patrolman Byars (R. 24-25). At about 10:30 a.m. Byars observed a group of four or six persons, including petitioner, walking south on the west sidewalk of 19th Street toward the intersection of 19th Street and Second Avenue (R. 16, 25, 35).[2] Newberry's Department Store is located at the northwest corner of that intersection (R. 17), having a front entrance on the corner (R. 17, 26). Byars entered a rear entrance of Newberry's, went through the store to the front entrance, and stood inside the entrance observing the corner (R. 16-17, 18, 26). On the corner, he saw a group of ten or twelve persons (R. 17, 27, 38, 138)[3] "all congregated in one area" (R. 17), "[s]tanding and listening and talking" (R. 17). Petitioner Shuttlesworth was among them (R. 17) and seems to have been at the center of the conversation (R. 38).

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[2] Byars conceded that the group was not obstructing traffic and was not violating any ordinance at this time (R. 25-26).

[3] When Officer Renshaw arrived after Byars had accosted the group, Renshaw estimated that there were eight or ten or twelve persons with petitioner (R. 40, 49). Officer Hallman, who seems to have observed the group at about the same moment, estimated that there were five or six persons with petitioner and petitioner's co-defendant below, Reverend James S. Phifer (R. 59), or five or six in all (R. 60). Officer Allred guessed the size of the group at the time as ten or fifteen or twenty (R. 71). Officer Davis put it at ten or twelve (R. 74).

Byars observed the group "for a minute to a minute and a half while they stood" (R. 18; see R. 26). He then left the store and told the group to move on and clear the sidewalk (R. 18, 138). Some but not all of the group began to move away (R. 18, 138). Byars repeated his command and petitioner asked: "You mean to say we can't stand here on the sidewalk?" (R. 18; cf. R. 38). At this moment, motorcycle patrolman Renshaw arrived on the scene and came up behind Patrolman Byars (R. 41, 47-48, 51). Officers Hallman and Davis, on a motion from Byars, came over from the southeast corner of the intersection (R. 59, 64, 74). Byars "said nothing in return. [He] . . . only hesitated again for a short time and informed them for the third and last time [he] . . . was informing them they would have to move and clear the sidewalk or else they would be placed under arrest for obstructing the sidewalk. . . . " (R. 18). By now, all persons save petitioner had dispersed (R. 28, 35, 60, 138-139). Petitioner repeated his inquiry whether the officer meant that they could not stand in front of the store (R. 18).[4] Byars told petitioner he was under arrest (R. 18). Petitioner said: "Well I will go into the store" (R. 18, 41, 139), and walked to Newberry's, where Byars followed him through the door and arrested him just inside (R. 18, 139). Petitioner offered no resistance and gave "[n]o trouble" (R. 30; see R. 55).[5] Byars estimated the time during which

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[4] Byars' testimony is not consistent on what, if anything, petitioner said at this time. At another point, Byars testified that petitioner's second question was: "Do you mean to tell me we can't go into the store?" (R. 20). Officer Renshaw testified that at this stage of the conversation, petitioner said: "We are just standing here on the sidewalk" (R. 41).

[5] Byars then took petitioner to the west curb of 19th Street just north of Second Avenue to await transportation to jail. Reverend James S. Phifer, one of petitioner's companions and

his three orders to disperse were given and petitioner arrested as one and one half minutes (R. 32).

There is considerable confusion in the officer's testimony as to the location of the group of ten or twelve persons standing on the corner outside Newberry's and as to how much, if at all, pedestrian traffic was impeded by their presence. Byars placed the group on the corner "in the western half of the western cross walk . . . " (R. 17)[6] but later testified they were "[j]ust east and north of the [east-west 19th Street] cross walk on the sidewalk" (R. 21). Renshaw placed them "at the curb on the 2nd Avenue side at the cross walk that crosses over 2nd Avenue" (R. 42), i.e., at the north-south crosswalk. Concerning the density of pedestrian traffic, Byars testified "There was some people moving back and forth" (R. 17). Traffic was "normal for a Wednesday at that particular time of day" (R. 20); Byars estimated that 75 to 100 pedestrians per minute were passing through the intersection, in all four directions, on all four corners (R. 30-31; see also R. 57). He said that: "On some occasions people who were walking in an easterly direction on the north side of 2nd Avenue had to go into the

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his co-defendant in the present trial, approached and began talking to petitioner. Byars twice told him that he could not talk to Shuttlesworth, who was a prisoner; and when Phifer continued to talk to petitioner, Byars arrested Phifer as well (R. 19, 32-33). Phifer's conviction of loitering and noncompliance with a police order after joint trial with petitioner below was reversed by the Alabama Court of Appeals, which found the evidence insufficient to sustain either charge. *Phifer* v. *City of Birmingham*, 42 Ala. App. 282, 160 So. 2d 898 (1963), *cert. denied*, 160 So. 2d 902 (Ala. 1964).

[6] When Byars says "in the . . . cross walk" he means on the sidewalk in front of the crosswalk. The record is clear that none of the group were in the street at any time; Byars explicitly testified that they were all on the sidewalk (R. 27).

street to get around the people who were standing there" (R. 17). Byars saw some people step off the curb (R. 20) into Second Avenue (R. 39), and said that "Due to the people moving in an westerly direction along 2nd Avenue they would have had to have waited until those people got by or either elect to go into the street to pass the group of people standing there" (R. 20; see R. 138). Again, the persons standing on the corner "were blocking half of the sidewalk causing the people walking east ["Along 2nd Avenue"] to go into the street around them" (R. 28). However, on cross examination, Byars testified that the persons on the corner did not block the east-west crosswalk at all (R. 22)[7] and that they left more than half of the north-south crosswalk free (R. 22). Officer Renshaw estimated that the group occupied "about half" the sidewalk (R. 41). They "had the crosswalk [sic] approximately half blocked" (R. 50). Actual disruption of pedestrian traffic must have been slight, for Officer Hallman, who was assigned to work traffic at the intersection (R. 61) and who was standing on the southeast corner of Second Avenue and 19th Street North (R. 59), saw the group standing on the northwest corner but took no note of them as a source of concern prior to Patrolman Byars' arrival on the scene (R. 62-63).

Although Byars testified that he had read of prior arrests of petitioner Shuttlesworth (R. 22-23) and had seen petitioner's photograph and seen him on television (R. 23)—and although Officer Renshaw conceded that petitioner was a notorious person in Birmingham by reason of his civil

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[7] Yet Byars testified he told the group to move on in order to allow free passage for pedestrians east and west (R. 18).

rights activities (R. 45-46; see also R. 77-78)[8]—Byars insisted that he was not familiar with petitioner's face at the time of the arrest (R. 23, 29; cf. R. 16). Byars said he "didn't pay particular notice to the race" of the persons in the group on the corner (R. 27), and at trial did not "know what color they were" (R. 36). He identified them as a group because "They were all standing and not moving" (R. 36). Officer Renshaw acknowledged that the group was all Negro (R. 49), and Officer Davis described them as "a group of colored people" (R. 73). The trial court permitted defense testimony that, because of the boycott, there were few other Negroes in the area at the time, making petitioner's group conspicuous (R. 89, 122: uncontradicted testimony of defense witness Armstrong and of petitioner). Other attempts by petitioner to show that his arrest and prosecution were racial harassment were disallowed by the trial court on prosecutor's objections (R. 115-116).

Petitioner's version of the events of April 4, 1962, supported by his testimony and that of his co-defendant Phifer and four other witnesses, was entirely irreconcilable with that of the arresting officers which the state courts credited. Petitioner with his five companions was walking south on 19th Street; slowed at the intersection of Second Avenue for a traffic light; was immediately accosted by Patrolman Byars and ordered to move on (Patrolman Byars, however, stationed himself directly in petitioner's path so that petitioner could not continue in the direction in which he had been walking); attempted to move on by going into Newberry's; and was pursued and arrested (R. 80-84, 87-89, 90-94, 100-104, 106-108, 111-112).

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[8] Renshaw admitted knowing petitioner by sight (R. 40) and recognizing him on the morning of April 4 (R. 48).

April 5, 1962, petitioner was tried and convicted in the Recorder's Court of the City of Birmingham of loitering and noncompliance with a police order, and was sentenced to 180 days at hard labor, $100 fine and costs (R. 1-2). He appealed for trial de novo in the Circuit Court of the Tenth Judicial District, and was there charged by complaint in two counts: One, that he "did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk . . . or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to . . . Section 1142 of the General City Code . . . , as amended . . . " (R. 3); Two, that he "did refuse to comply with a lawful order, signal or direction of a police officer, contrary to . . . Section 1231 of the General City Code . . . " (R. 3). By motion to quash and demurrers timely filed, petitioner attacked these charges on the grounds that the ordinances under which they were laid were unconstitutional on their faces and as applied to his conduct, by force of the First and Fourteenth Amendments to the Constitution and because the charges and ordinances were vague and overbroad in contravention of those Amendments (R. 4-6). At the conclusion of the prosecution's case, he moved to exclude the testimony and for judgment on the grounds that the charges were supported by "absolutely no evidence" and that the conduct for which he was prosecuted was protected by the First and Fourteenth Amendments (R. 7). The Circuit Court overruled all these objections, found the defendant "guilty as charged in the Complaint" (R. 10), sentenced him to 180 days at hard labor and to another 61 days at hard labor in default of fine and costs, and overruled his timely motion for new trial (R. 8-9) renewing all

his federal contentions and claiming error in the exclusion of testimony intended to show that the prosecution was racial harassment (R. 10-11). The Alabama Court of Appeals affirmed the conviction and sentence (R. 136-137), expressly rejecting petitioner's federal attack on the ordinances by reference to *Phifer* v. *City of Birmingham*, 42 Ala. App. 282, 160 So. 2d 898 (1963), *cert. denied*, 160 So. 2d 902 (Ala. 1964),[9] holding the evidence sufficient to support the verdict, and rejecting petitioner's claim of error in the exclusion of testimony (R. 139-141). Timely application for rehearing was denied by that court (R. 141); the Alabama Supreme Court denied timely applications for *certiorari* and for rehearing (R. 146-147) preserving petitioner's federal contentions (R. 144-145).

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[9] In *Phifer*, the Alabama Court of Appeals sustained the overruling of a motion to quash and demurrers by petitioner Shuttlesworth's co-defendant below, these documents being identical to those filed on behalf of Shuttlesworth. Phifer's constitutional attack on Section 1142, the loitering ordinance, was rejected on the merits; Phifer's challenge to Section 1231 was not reached, because "While the demurrer in its caption is directed to the complaint 'and to each and every count thereof, separately and severally,' it is really interposed to the two counts of the complaint jointly." 42 Ala. App. at ——, 160 So. 2d at 900. Whatever the force under state law of this esoteric ruling that a paper expressly captioned "several" is to be deemed "joint," it is clear that the ground is insufficient to bar this court's review on the merits of the attack on Section 1231. Any "objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." *Douglas* v. *Alabama*, 380 U. S. 415, 422, see *Henry* v. *Mississippi*, 379 U. S. 443 (1965). In any event, the matter is immaterial because petitioner's attack on Section 1142 is dispositive of the case. See pp. 13-14 *infra*.

Summary of Argument

I. Petitioner having been charged by complaint with three distinct offenses, and having been found "guilty as charged in the Complaint," is entitled to have his conviction reversed by this Court if any one of the charges is constitutionally invalid.

II. Birmingham Code §1142, insofar as it makes it unlawful to stand or loiter on any sidewalk of the city after having been requested by a police officer to move on, is vague and overbroad and hence unconstitutional under the First and Fourteenth Amendments. As written, the ordinance gives any policeman absolutely arbitrary power to order a citizen—including any citizen who may be exercising his rights of free expression to picket, address a crowd, or distribute a handbill—off the streets; and subjects the citizen to severe criminal penalties if he pauses some indefinite period of time to question the policeman's order. Construction of the section by the Alabama courts so as to make unlawful only disobedience of a policeman's order addressed to one who loiters so as to obstruct free passage on the sidewalks cannot validate petitioner's conviction because (A) this narrowing construction post-dated his alleged violations and his conviction; (B) the Alabama decisions impermissibly throw the burden of proof on a defendant to disprove that he was loitering so as to obstruct free passage; and (C) a prohibition of loitering so as to obstruct free passage—lacking any requirement of *mens rea* or of actual obstruction of pedestrians—is itself unconstitutionally vague and overbroad.

III. Birmingham Code §1142, insofar as it makes it unlawful tc so stand, loiter, or walk on any sidewalk in the

city as to obstruct free passage on the sidewalk, is similarly vague and overbroad.

IV. Birmingham Code §1231, making it unlawful to refuse to comply with a lawful police order, has been construed by the Alabama Court of Appeals as applying only to police orders relating to vehicular traffic. Conviction of petitioner under the ordinance for failing to obey a police order commanding a group of pedestrians on a sidewalk to move on entirely lacks evidentiary support.

ARGUMENT

I.

Since the Verdict Against Petitioner Was General, His Conviction Must Be Reversed if Any of the Charges Is Constitutionally Invalid.

The two-count complaint against petitioner charged in its first count that he did stand, loiter or walk on a street or sidewalk in a group of persons so as to obstruct free passage over the street or sidewalk, *or* did loiter on the street or sidewalk within the group after a police request to move on. This charge is framed upon the two disjunctive sentences of the second paragraph of Birmingham City Code §1142, as amended, pp. 2-3 *supra*, making it unlawful for any person or number of persons "to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk" and making it "also . . . unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." In its second count, the complaint charged that petitioner did

refuse to comply with a lawful police order, in violation of Birmingham City Code §1231, making it unlawful "to refuse or fail to comply with any lawful order, signal or direction of a police officer." Since petitioner was found by the Circuit Court "guilty as charged in the Complaint," familiar principles require that the conviction be reversed if any of the three offenses described in sections 1142 and 1231 are constitutionally vulnerable. *Stromberg* v. *California*, 283 U. S. 359, 367-368 (1931); *Williams* v. *North Carolina*, 317 U. S. 287, 291-293 (1942); *Thomas* v. *Collins*, 323 U. S. 516, 529 (1945).

II.

On Its Face, and as Applied to Petitioner's Conduct, Section 1142's Proscription of Standing or Loitering on a Sidewalk After a Police Order to Move on Is Vague and Overbroad in Violation of the First and Fourteenth Amendments.

A. *The ordinance as written is vague and overbroad.*

Understood as it is plainly written, Birmingham Code §1142 prohibits any loitering or standing on a sidewalk after a police order to move on. The word "also" is used to make clear that this is an offense distinct from obstructive loitering. To be guilty of it, a defendant need not have loitered so as to obstruct pedestrian traffic prior to the policeman's order, nor after the order. The order itself is not required in express terms to be lawful. Compare §1231, p. 3 *supra*. The circumstances under which an order to move on may be made by a policeman are in no way defined or restricted. The ordinance simply puts a citizen's right to be on the sidewalks of Birmingham in the unfettered discretion of the police.

Such an ordinance is patently unconstitutional under the decisions of this Court. Among the persons falling within its broad and undifferentiated grant of regulatory power to the police are classes of persons exercising their First-Fourteenth Amendment freedoms of expression in many classic forms: handbill distributors, soapbox speakers, peaceful demonstrators, religious evangelists requesting audience of passers-by. That such persons may not be denied the use of the streets by order of the police in a policeman's unconfined discretion is settled. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). And see *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Schneider* v. *State*, 308 U. S. 147 (1939) (Schneider's case); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Tucker* v. *Texas*, 326 U. S. 517 (1946); *Saia* v. *New York*, 334 U. S. 558 (1948); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Staub* v. *Baxley*, 355 U. S. 313 (1958).

So the ordinance cannot constitutionally mean what it purports to say. It cannot constitute the police the censors of the sidewalks in violation of the cited decisions. It cannot constrain a citizen to obey a police order whether lawful or unlawful, because "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright* v. *Georgia*, 373 U. S. 284, 291-292 (1963). See *Taylor* v. *Louisiana*, 370 U. S. 154 (1962); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); cf. *Thompson* v. *City of Louisville*, 362 U. S. 199, 206 (1960); *Barr* v. *City of Columbia*, 378 U. S. 146, 150 (1964).

But if the ordinance cannot condemn all of the conduct which on its face it appears to condemn, what conduct is

in fact prohibited by it? When does it authorize an officer to issue orders, and when does it oblige a citizen to obey them? If it be assumed that the ordinance requires obedience only to lawful orders, and that it empowers a policeman to command citizens to move on only when he can constitutionally do so, the effect of the regulation is to make the citizen guess under threat of criminal penalty the boundaries of his constitutional freedom to use the streets. That is, as one Circuit Court has aptly put it, "a difficult question which must necessarily be dependent upon the facts of the particular case," *Anderson* v. *Albany*, 321 F. 2d 649, 657 (5th Cir. 1963); see *Cox* v. *Louisiana*, 379 U. S. 536, 554-555 (1965), and an ordinance which makes this uncertain constitutional boundary the line of criminality is obnoxious to all of the objections which have caused this Court to void numerous statutes and ordinances which encroached overbroadly on constitutionally protected conduct. First, by reason of the obscurity of the constitutional boundary itself, the ordinance gives no fair notice, "no warning as to what may fairly be deemed to be within its compass." Mr. Justice Harlan, concurring, in *Garner* v. *Louisiana*, 368 U. S. 157, 185, 207 (1961); see Note, 109 U. Pa. L. Rev. 67, 76 (1960), and authorities cited in footnote 51. Second, the ordinance remains "susceptible of sweeping and improper application," *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 433 (1963), furnishing in its overbreadth a convenient tool for "harsh and discriminatory enforcement by prosecuting officials, against particular groups deemed to merit their displeasure," *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98 (1940), and inviting arbitrary, autocratic and harassing uses by the police. "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." *N.A.A.C.P.* v. *Button*, *supra*,

at 435. Finally, the threat of serious penalties—here nearly eight months at hard labor—for any citizen who, in the service of an unpopular cause, guesses wrongly the boundaries of his constitutional freedoms (or is unable to persuade a state trial judge to discredit the testimony of policemen that he guessed them wrongly), serves effectively to coerce the citizen to obey even lawless police orders and surrender through fear his constitutional rights to the free use of the streets. See *Thornhill* v. *Alabama, supra,* at 97-98; *Smith* v. *California,* 361 U. S. 147, 150-151 (1959); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 286-288 (1961); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 66-70 (1963); *Baggett* v. *Bullitt,* 377 U. S. 360, 378-379 (1964); *Dombrowski* v. *Pfister,* 380 U. S. 479, 494 (1965); and see *United States* v. *National Dairy Prods. Co.,* 372 U. S. 29, 36 (1963) (dictum). Plainly an ordinance so written is bad on its face.

Moreover, this ordinance is susceptible of the same criticisms in another of its operative elements. Section 1142 makes it unlawful to "stand or loiter" on the street after having been told to move on. In this case petitioner was found guilty of standing or loitering on evidence that, during less than a minute and a half, he persisted in asking the officer whether the officer seriously meant that he could not stand on the sidewalk in front of Newberry's. No *scienter* or *mens rea,* no intention to disobey or flout the officer's order, was shown; apparently none is required by the ordinance as construed by the Alabama courts. Whatever obstruction to pedestrians might at any time have existed was now gone; all petitioner's companions had dispersed; and, with the explicit concerns of the officer's initial order satisfied, petitioner stood where he was for the ostensible purpose of inquiring what the officer commanded, and perhaps

of verbally contesting his authority to make the command. The officer did not reply to petitioner's question or otherwise explain himself; he merely repeated his command—whose justification had faded or was fading; and petitioner repeated his question. If evidence of such conduct is constitutionally sufficient to support conviction under §1142, see *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960), the ordinance has been construed in such a way as to jeopardize any citizen who pauses to question an officer's order. At some unascertainable point his delay in complying causes him to "stand or loiter" and thereby makes his conduct criminal. Here again the vice of the ordinance is that it cannot mean what it purportedly says, see *Thompson* v. *City of Louisville, supra,* at 206, and no principle to limit what it purportedly says sufficiently intelligible to accord fair notice and assure non-arbitrary application appears.[10] When this deficiency is coupled with the vagueness of the ordinance as to the circumstances under which a policeman may make an order to move on, §1142 becomes little more than a snare. It is nigh impossible for the citizen to ascertain the propriety of the policeman's command, and he who stops to question may find himself a misdemeanant.[11]

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[10] Cf. *Commonwealth* v. *Carpenter*, 325 Mass. 519, 91 N. E. 2d 666 (1950), voiding an ordinance which made it unlawful to "willfully and unreasonably saunter or loiter for more than seven minutes after being directed by a police officer to move on."

[11] In *Cox* v. *Louisiana*, 379 U. S. 536, 551 (1965), this Court said that a statute punishing one who "fails or refuses to disperse and move on" when ordered to do so by an officer would be sufficiently specific if the conditions under which the officer's order might issue were narrowly restricted. Here they are unrestricted, as in *Cox;* and the language "stand or loiter," construed without a requirement of intent to resist the officer, is considerably more vague than "fails or refuses to disperse." See *Carlson* v. *California*, 310 U. S. 106, 112 (1940).

On the present record, the potential of §1142 for unfair, arbitrary and discriminatory application has been fully realized. Had Newberry's windows presented a fetching Easter display, and had a crowd of attracted persons paused to look, filling half the sidewalk for a minute and a half, it is inconceivable that Patrolman Byars would have commanded them to move on. Had such a command been made, and—while the crowd was dispersing—had one such window-shopper asked Byars did Byars really mean he could not look in the window, it is inconceivable that he would have been arrested and charged, and phantasmagoric that he would have been convicted and sentenced to almost eight months at hard labor. Had a Newberry's delivery man blocked the same half a sidewalk for the same ninety seconds, or had he stopped to complain to an officer when told to move on, no sane mind could imagine that he would be found in petitioner Shuttlesworth's posture today. Yet if Shuttlesworth was warned that his position was different from that of the window-shopper or delivery man, it was only because Shuttlesworth is a Negro and a "notorious" civil rights leader in Birmingham, Alabama. And however convincing to a state court may be Patrolman Byars' protestations that he did not recognize Shuttlesworth when he proceeded through Newberry's to observe, command and then arrest him, any non-racial explanation for the ultimate result in this prosecution is delusive. The very fact that, under this Court's ordinary practice, Byars' testimony must escape strict review here is the strongest reason for invalidation of the vague ordinance under which such a conviction could occur.

B. *The construction of §1142 by the Alabama courts has not cured its objectionable vagueness and overbreadth.*

Petitioner's case and that of his co-defendant below, Reverend James S. Phifer, were the first involving the ordinance to reach the Alabama appellate courts. In neither case did the Alabama Court of Appeals attempt any limiting construction of §1142. *Phifer* v. *City of Birmingham*, 42 Ala. App. 282, 160 So. 2d 898 (1963), *cert. denied*, 160 So. 2d 902 (Ala. 1964);[12] *Shuttlesworth* v. *City of Birmingham*, 42 Ala. App. 296, 161 So. 2d 796 (1964), *cert. denied*, 161 So. 2d 799 (Ala.), R. 137-141. The appeal in *Shelton* v. *City of Birmingham*, 42 Ala. App. 371, 165 So. 2d 912 (1964), involved Birmingham Code §1231, p. 3 *supra* (noncompliance with a police order); affirming a civil rights demonstrator's conviction under that ordinance, the Court of Appeals adopted the rule that "the failure to comply with a police officer's order to 'Move on,' 'can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order.'" 42 Ala. App. at ——, 165 So. 2d at 913.[13] Judge Cates dis-

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[12] Phifer's conviction was reversed for want of evidence that he had loitered or stood on the sidewalk after being told to move on. Since the record was clear that everyone save Shuttlesworth had dispersed at Byars' order, and that Byars himself did not believe Phifer had failed to comply with his order, this decision is uninformative as to the meaning of §1142. In sustaining the ordinance against Phifer's claim that it was facially unconstitutional, the Court of Appeals characterized it as a traffic regulation, but this characterization says nothing about the incidence or operative elements of §1142. The cases cited by the court as involving "similar" ordinances, 42 Ala. App. at ——, 160 So. 2d at 900, in fact involve several different sorts of regulations.

[13] The court quotes *People* v. *Galpern*, 259 N. Y. 279, 181 N. E. 572 (1932), and cites *State* v. *Taylor*, 38 N. J. Super. 6, 118

agreed on this latter point. *Smith* v. *City of Birmingham*, 42 Ala. App. 467, 168 So. 2d 35 (1964), and *Middlebrooks* v. *City of Birmingham*, —— Ala. App. ——, 170 So. 2d 424 (1964), *cert. denied*, 170 So. 2d 427 (Ala. 1964), applied the rule of *Shelton* to Birmingham Code §1142, with Judge Cates still objecting that that rule impermissibly required a defendant "to come into court and disprove the policeman's case." *Middlebrooks* v. *City of Birmingham, supra*, —— Ala. App. at ——, n. 3, 170 So. 2d at 426 n. 3. In the *Smith* opinion, the court in an extended footnote first announced the view that §1142 was directed at loitering so as to obstruct the streets or sidewalks; the implication of the footnote, not altogether clear, is that the sort of order envisioned by §1142, following which one may not stand or loiter, is an order directed to an individual who is previously in violation of the disjunctive provision of the ordinance prohibiting standing, loitering or walking "so . . . as to obstruct free passage" on a street or sidewalk. *Smith* v. *City of Birmingham, supra*, 42 Ala. App. —— at n. 1, 168 So. 2d at 36-37, n. 1.[14] The *Middlebrooks* opinion definitively adopted this view. Section 1142:

A. 2d 36 (1955), which also quotes *Galpern*, 38 N. J. Super. at 30, 118 A. 2d at 49, but is otherwise irrelevant. The facts in *Galpern*, which sustain the conviction of a lawyer for congregating with others on a sidewalk and refusing to move on when ordered by police, evidence that the rule of the New York decision, adopted by the Alabama Court of Appeals, leaves the police judgment to issue a dispersal order virtually immune against judicial review.

[14] The footnote is confusing because it quotes or summarizes decisions of the courts of other States—whether for purposes of approval or of distinction is unclear—which rest on statutes different from §1142 and differing among themselves. The holding in the *Smith* case turns on construction of the term "sidewalk" in §1142, and so is not helpful on the larger questions posed by the ordinance.

. . . is directed at obstructing the free passage over, on or along a street or sidewalk by the manner in which a person accused stands, loiters or walks thereupon. Our decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense.

That there must also be a showing of the accused's blocking free passage is the ratio decidendi of *Phifer* v. *City of Birmingham* . . . and *Shuttlesworth* v. *City of Birmingham* . . . In this respect, we distinguish our reasoning from that employed in *Tinsley* v. *City of Richmond,* 202 Va. 707, 119 S. E. 2d 488. See *Smith* v. *City of Birmingham.* . . .

The judges of this court in *Shelton* v. *City of Birmingham* . . . divided two to one as to whether or not evidence of a policeman ordering a defendant to move on under a similar ordinance was sufficient to make a prima facie case. Regardless of the quantum of proof required, the court in the instant case is again, as it was in the *Shelton* case, unanimous in its conclusion [affirming a civil rights demonstrator's conviction] (—— Ala. App. at ——, 170 So. 2d at 426).

Thus, as now viewed by the Alabama Court of Appeals, the loitering-after-order provision of §1142 is violated only when a defendant (1) stands, loiters or walks on the streets or sidewalks so as to obstruct free passage, (2) is requested by an officer to move on, (3) thereafter loiters or stands on the street or sidewalk. At trial on the charge, the fact that the policeman requested the defendant to move on makes a prima facie case that the defendant was previously standing, loitering or walking so as to obstruct the streets

or sidewalks, and the defendant can justify disobedience of the order only if he can show that it was "purely arbitrary and was not calculated in any way to promote the public order."

These decisions concededly narrow the sweeping scope of §1142 as written. However, they are ineffective for several reasons to give constitutional validity to petitioner's conviction.

First, the decisions post-date petitioner's arrest and conviction, and so cannot retrospectively validate the ordinance as applied in his case. *Bouie* v. *City of Columbia*, 378 U. S. 347, 352-354 (1964). Petitioner took this sweeping regulation as he found it written; as written it was unconstitutional on its face; because unconstitutional on its face, he was entitled to disobey it. Cf. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Staub* v. *Baxley*, 355 U. S. 313 (1958).

Second, the limitation of a citizen's obligation to obey a police order to circumstances where the citizen has been loitering so as to obstruct free passage prior to the order is an ineffective limitation, coupled as it is with the rule that the fact of issuance of the order establishes prima facie the circumstance of prior obstructive loitering. The effect of the "prima facie" rule is to require the citizen who disobeys a police order to prove at his trial that he was not loitering so as to obstruct free passage prior to the order. That requirement in effect erases prior loitering as an operative element of the charge, for the city need not prove it at the trial. And it can hardly be supposed that the issuance of a police order has a sufficient rational tendency to show the order's justification to permit Alabama constitutionally to shift the burden of proof of non-justifica-

tion to the defendant. *Dombrowski* v. *Pfister*, 380 U. S. 479, 494-496 (1965); see *Tot* v. *United States*, 319 U. S. 463, 469 (1943). What is at issue here is the method of litigation not merely of an element of the charge of loitering, but of a defendant's First-Fourteenth Amendment defense to that charge.[15] On such an issue, the State may not consistently with those Amendments shift the burden of proof to the accused; *Speiser* v. *Randall*, 357 U. S. 513 (1958), is squarely dispositive. Indeed, §1142 presents a far stronger case of unconstitutional burden-shifting than *Speiser*. For the defendant cannot fairly be required to disprove the policeman's justification for an order at the trial unless the defendant be given some opportunity to inquire concerning the basis of the order at the time it is issued. But the vagueness of the prohibition that the defendant "stand or loiter" after the order, see pp. 2-3 *supra*, makes any pause for purposes of inquiry impermissibly hazardous.

Finally, even if §1142, as applicable in petitioner's case, clearly precluded conviction except on proof that the petitioner had stood, loitered or walked on the sidewalk so as to obstruct free passage, and had then wilfully refused

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[15] Although the petitioner's version of the facts surrounding his arrest was that he was merely walking on the street when accosted by Patrolman Byars, the version upon which the State of Alabama relies to support his conviction is that petitioner was addressing a group of persons on a street corner. That this is activity protected by the First and Fourteenth Amendments is hardly disputable. In any event, the ordinance in its normal application clearly applies to many sorts of First-Fourteenth Amendment activity, see p. 15 *supra;* and, where this is the case, petitioner need not show that his own conduct was protected to challenge the ordinance for overbreadth. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

to obey a policeman's order to move on, the ordinance would remain void for overbreadth. The point was decided under a virtually identical ordinance in *In Re Bell*, 19 Cal. 2d 488, 122 P. 2d 22 (1942) (per Mr. Justice Traynor),[16] upon authority of this Court's decisions in *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and *Carlson* v. *California*, 310 U. S. 106 (1940). Justice Traynor reasoned—rightly, petitioner believes—that this "sweeping prohibition . . . would apply equally against peaceful pickets, shoppers engrossed in a window display, invalids in wheelchairs, acquaintances who stand engaged in conversation." 19 Cal. 2d at 497, 122 P. 2d at 28.[17] The proscription of standing, loitering, or walking on any sidewalk encompasses all these classes of persons, together with others—the peaceful demonstrators in *Fields* v. *South Carolina*, 375 U. S. 44 (1963), and *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964); the orators in *Kunz* v. *New York*, 340 U. S. 290 (1951), and *Niemotko* v. *Maryland*, 340 U. S. 268 (1951)—who exercise their First-Fourteenth Amendment freedoms on the public sidewalks. It is hardly debatable that an interdiction in even the narrowest of these terms, an interdiction of "loitering" *sim-*

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[16] The ordinance in *Bell* was broader in one aspect than §1142, making it unlawful "to loiter, stand, or sit upon any public highway, alley, sidewalk or crosswalk so as to in any manner hinder or obstruct the free passage therein or thereon of persons or vehicles passing or attempting to pass along the same, or so as to in any manner annoy or molest persons passing along the same." But Justice Traynor's opinion makes clear that the California Supreme Court found the provision overbroad in its "obstruct" aspect independently of its "molest" aspect. 19 Cal. 2d at 496, 122 P. 2d at 27-28.

[17] That these applications are not fantastic imaginings—at least where citizens on the streets make themselves personally obnoxious to officers—is evidenced by the record in *People* v. *Galpern*, note 13, *supra*. The constitutionality of the statute as applied in that case was not before the court.

pliciter, would be overbroad and hence unconstitutional.[18] And the qualifications that the loitering, or standing or walking, constitute "blocking free passage," *Middlebrooks*

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[18] Every court except the Supreme Court of Virginia which has considered the constitutionality of a proscription of loitering *simpliciter* has held such a proscription void for overbreadth and vagueness. *Territory of Hawaii* v. *Anduha*, 48 F. 2d 171 (9th Cir. 1931); *Soles* v. *City of Vidalia*, 92 Ga. App. 839, 90 S. E. 2d 249 (1955); *State* v. *Caez*, 81 N. J. Super. 315, 195 A. 2d 496 (1963); *City of St. Louis* v. *Gloner*, 210 Mo. 502, 109 S. W. 30 (1908); *People* v. *Diaz*, 4 N. Y. 2d 469, 151 N. E. 2d 871 (1958); *City of Akron* v. *Effland*, 112 Ohio App. 15, 174 N. E. 2d 285 (1960); *Ex parte Mittelstaedet*, 164 Tex. Crim. 115, 297 S. W. 2d 153 (1957); cf. *State* v. *Hunter*, 106 N. C. 796, 11 S. E. 366 (1890); *Village of Deer Park* v. *Schuster*, 16 Ohio Ops. 485, 30 Ohio L. Abs. 466 (C. Com. Pls. 1940). *Contra: Benson* v. *City of Norfolk*, 163 Va. 1037, 177 S. E. 222 (1934); *Tinsley* v. *City of Richmond*, 202 Va. 707, 119 S. E. 2d 488 (1961), app. dism'd, 368 U. S. 18 (1961).

State courts have sustained certain limited classes of regulations prohibiting loitering, standing or wandering on the streets:

(A) Prohibitions of loitering at late hours or under suspicious circumstances and failing to give a good account of oneself: *Dominguez* v. *City and County of Denver*, 147 Colo. 233, 363 P. 2d 661 (1961); *City of Portland* v. *Goodwin*, 187 Ore. 409, 210 P. 2d 577 (1949). But such regulations are construed to require overt suspicious conduct, *ibid.*; *Harris* v. *District of Columbia*, 132 A. 2d 152, 154 (M. C. A. D. C. 1957), *rev'd on other grounds*, 251 F. 2d 913 (D. C. Cir. 1958); *Harris* v. *District of Columbia*, 192 A. 2d 814 (C. A. D. C. 1963); *State* v. *Salerno*, 27 N. J. 289, 296, 142 A. 2d 636, 639 (1958) (dictum); absent such a limitation, they are unconstitutional, *Headley* v. *Selkowitz*, 171 So. 2d 368 (Fla. 1965).

(B) Prohibitions of loitering by specified classes of persons (known thieves, pickpockets, etc.) often for specific illegal purposes: *Harris* v. *District of Columbia*, *supra*, in 132 A. 2d 152; *In re Cregler*, 56 Cal. 2d 308, 363 P. 2d 305, 14 Cal. Rptr. 289 (1961). These are the classical "vagrancy" loitering regulations.

(C) Prohibitions of loitering in certain specified places whose nature suggests a specific illicit purpose of the loiterer: schools, *State* v. *Starr*, 57 Ariz. 270, 113 P. 2d 356 (1941); *Phillips* v. *Municipal Court*, 24 Cal. App. 2d 453, 75 P. 2d 548 (1938); *People* v. *Johnson*, 6 N. Y. 2d 549, 161 N. E. 2d 9 (1959); railroad toilets or platforms, *People* v. *Bell*, 306 N. Y. 110, 115 N. E. 2d 821

v. *City of Birmingham, supra,* does not sufficiently narrow the interdiction. This qualification does not require any purpose to obstruct, or any knowledge that free passage is obstructed, merely that "free passage" be blocked.[19] What constitutes "free passage" remains unclear, and thus is left at the risk of the defendant, the whim of the policeman (whom the defendant may not question), the arbitrary determination of a magistrate or trial court. No use of the

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(1953); waterfront docks and warehouses, *People* v. *Merolla,* 9 N. Y. 2d 62, 172 N. E. 2d 541 (1961). Such regulations are regularly construed to forbid only loitering for the specific illicit purpose. *Ibid.; In re Huddleson,* 229 A. C. A. No. 3, 721, 40 Cal. Rptr. 581 (1964).

(D) Prohibitions of presence on the streets by specified classes of persons (ordinarily minors) at specified times: *Thistlewood* v. *Trial Magistrate for Ocean City,* 236 Md. 548, 204 A. 2d 688 (1964). These are the classical curfew regulations.

(E) Prohibitions of actual obstruction of streets or sidewalks by loitering or standing: *Ex parte Bodkin,* 86 Cal. App. 2d 208, 212, 194 P. 2d 588, 591-592 (1948); *City of Chariton* v. *Fitzsimmons,* 87 Iowa 226, 229-230, 54 N. W. 146, 147 (1893); *State* v. *Sugarman,* 126 Minn. 477, 479, 148 N. W. 466, 468 (1914); *Commonwealth* v. *Challis,* 8 Pa. Super. 130, 132 (1898); *City of Tacoma* v. *Roe,* 190 Wash. 444, 445, 68 P. 2d 1028, 1029 (1937). At the cited pages the respective courts construe these regulations as requiring actual obstruction of persons attempting to use the sidewalks, not mere loitering in such a manner as might obstruct hypothetical users of the sidewalks. And see *Whaley* v. *Cavanagh,* 237 F. Supp. 900 (S. D. Cal. 1963) *aff'd per curiam on opinion below,* 341 F. 2d 295 (9th Cir. 1965), where the facial constitutionality of the regulation was not challenged and actual obstruction of pedestrians was found.

[19] On this ground, the decisions in paragraph (E) of the preceding footnote are distinguishable. The Alabama Court of Appeals in *Middlebrooks* apparently meant to justify the issuance of a police order under §1142 whenever, in the language of the first sentence of the second paragraph of that section, "any person or number of persons . . . *so* stand, loiter or walk upon any street or sidewalk in the City *as to obstruct free passage* over, on or along said street or sidewalk." (Emphasis added.)

sidewalks that can be imagined fails in some measure to obstruct free passage—even though no pedestrian in fact be passing or impeded. The window-shopper, the delivery man, the peaceful picket, the peaceful demonstrator, the pedestrian who kneels to tie a shoe-lace, all obstruct free passage.

> It is almost needless to say that such an act cannot be enforced, and that no attempt will be made to enforce it, indiscriminately. It may be enforced against those poor hapless ones who are unable to assert or protect their rights, but as to all others it will remain a dead letter. It may be enforced to suppress one class of idlers in order to make a place more attractive to idlers of a more desirable class . . . ,[20]

or, as here, to suppress the members of an unpopular race. If the City of Birmingham wishes to prohibit the actual obstruction of pedestrians by standing, loitering or walking on a sidewalk with a purpose to obstruct it, the City may do so in those narrow terms. But a prohibition of all standing, loitering or walking in such a manner as to obstruct free passage sweeps too broadly; and disobedience of a police order justifiable in those vague terms may not constitutionally be punished. *Cox* v. *Louisiana, supra,* 379 U. S. at 551.[21]

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[20] *Territory of Hawaii* v. *Anduha,* 48 F. 2d 171, 173 (9th Cir. 1931).

[21] *Tinsley* v. *City of Richmond,* 368 U. S. 18 (1961), is not apposite in this regard. Nowhere in the Virginia courts or in her jurisdictional statement in this Court did Tinsley invoke the First Amendment, either in her own behalf or as a ground for general invalidity of the ordinance there involved. Nor, on the

III.

On Its Face, and as Applied to Petitioner's Conduct, Section 1142's Proscription of Standing, Loitering or Walking on a Sidewalk so as to Obstruct Free Passage Thereon Is Vague and Overbroad in Violation of the First and Fourteenth Amendments.

For the reasons stated in the preceding paragraph, that portion of Birmingham Code §1142 which purports to make it unlawful "for any person or any number of persons to *so* stand, loiter or walk upon any . . . sidewalk in the City *as to obstruct free passage* over, on or along said . . . sidewalk" (emphasis added) is too vague and overbroad to meet First-Fourteenth Amendment demands.

IV.

Petitioner's Conviction for Violation of §1231 Is Supported by No Evidence.

If construed as broadly as it is written, Birmingham Code §1231, making it "unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer," would be objectionable for the reasons stated at pp. 14-15 *supra*. The Alabama Court of Appeals,

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facts of *Tinsley*, was any colorable First Amendment claim presented. Compare note 15 *supra*. Tinsley put her contentions simply on a right of personal liberty to move about the streets, a right of the sort given expression in *Pinkerton* v. *Verberg*, 78 Mich. 573, 44 N. W. 579 (1889), quoted in her jurisdictional statement at p. 9, n. 4. But it is settled that the standards of permissible vagueness are uniquely stringent where a challenged regulation touches the freedoms of expression protected by the First Amendment as incorporated in the Fourteenth. Compare *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 432 (1963), and authorities cited, *with United States* v. *National Dairy Prods. Co.*, 372 U. S. 29, 36 (1963).

however, has put a quite narrow construction on the section. Reversing the conviction of petitioner's co-defendant below, that court said of §1231:

> . . . This section appears in the chapter regulating *vehicular traffic,* and provides for the enforcement of the orders of the officers of the police department in directing *such traffic.* There is no suggestion in the evidence that the defendant violated any *traffic regulation* of the city by his refusal to move away from Shuttlesworth when ordered to do so. (*Phifer* v. *City of Birmingham,* 42 Ala. App. 282, 160 So. 2d 898, 901 (1963), *cert. denied,* 160 So. 2d 902 (Ala. 1964).)

Nor is there any evidence in the present case that petitioner Shuttlesworth violated any vehicular traffic regulation. Thus—unless the Alabama Court of Appeals is permitted, Alice-like and in blatant violation of due process of law—to change the meaning of the State's penal statutes case by case, petitioner's conviction under §1231 is entirely lacking in evidentiary support. *Thompson* v. *City of Louisville,* 362 U. S. 199 (1960); *Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Taylor* v. *Louisiana,* 370 U. S. 154 (1962); *Fields* v. *Fairfield,* 375 U. S. 248 (1963); *Barr* v. *City of Columbia,* 378 U. S. 146 (1964).

CONCLUSION

The judgment of the Alabama Court of Appeals affirming petitioner's conviction should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN C. AMAKER
10 Columbus Circle
New York, New York 10019

PETER A. HALL
ORZELL BILLINGSLEY, JR.
1630 Fourth Avenue North
Birmingham, Alabama

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

Attorneys for Petitioner

INDEX.

Page

Questions presented 1

Statement of case 2

Summary of argument 8

Argument 10

Conclusion 38

Cases Cited.

Allison-Russell Withington Co. v. Sommers, 121 So. 42, 219 Ala. 33 14

Andalusia Motor Company v. Mullins, 183 So. 456, 28 Ala. App. 201, cert. denied 183 So. 460, 236 Ala. 474 ..... 37, 38

Barbour v. State of Georgia, 248 U. S. 454, 39 S. Ct. 316 15

Barton v. U. S., 25 Fed. 2d 967, cert. denied 49 S. Ct. 24, 278 U. S. 621, 73 L. ed. 542 37

Benson v. City of Norfolk, 163 Va. 1037, 177 S. E. 222 14

Blair v. Greene, 246 Ala. 28, 18 S. 2d 688 25

Bouie v. City of Columbia, 84 S. Ct. 1697, 378 U. S. 347 25

Cahaba Coal Co. v. Elliott, 62 So. 808, 810, 183 Ala. 298 14

Challis v. Pennsylvania, 8 Pa. Sup. 130, 132..... 14

City of Chariton v. Fitzsimmons, 54 N. W. 146, 87 Iowa 226 14

City of Tacoma v. Roe, 190 Wash. 444, 68 P. 2d 1028 14

City v. Shuttlesworth, 42 Ala. App. 296, 161 So. 2d 796 24

Claassen v. United States, 142 U. S. 140, 146, 12 S. Ct. 169, 35 L. ed. 966 37

Clift v. U. S., 22 Fed. 2d 549 37
Cox v. Louisiana, 379 U. S. 536, 85 S. Ct. 453 .....18, 19, 20, 29, 30
Davis v. Wechsler, 263 U. S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143 15
Douglas v. State of Alabama, 380 U. S. 415, 422, 85 S. Ct. 1074 15
Drummond v. State, 67 So. 2d 280, 37 Ala. App. 308 35
Ex Parte Bell, 19 Cal. 2d 488, 122 P. 2d 22 28
Ex Parte Bodkin, 86 Cal. App. 2d 208, 194 P. 2d 588 14
Ex Parte Bodkin, 194 Pac. 2d 588, 591, 86 Cal. App. 2d 208 29
Fort v. Civil Service Comm. of Alameda County, 38 Cal. Rptr. 625, 392 P. 2d 385 28
Garner v. State of Louisiana, 82 S. Ct. 298, 368 U. S. 157 12
Henry v. State of Mississippi, 379 U. S. 443, 85 S. Ct. 564 15
Herndon v. State of Georgia, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, rehearing denied 56 S. Ct. 82, 296 U. S. 661, 80 L. Ed. 471..... 15
Hiawassee River Power Co. v. Carolina Tennessee Power Co., 252 U. S. 341, 40 S. Ct. 330..... 15
Howison v. Oakley, 23 So. 810, 118 Ala. 215..... 14
Jones v. Belue, 200 So. 886, 241 Ala. 22 38
Long v. Leith, 16 Ala. App. 295, 77 So. 445 38
Martin v. State, 81 So. 851, 17 Ala. App. 73..... 35
Middlebrooks v. City of Birmingham, ... Ala. App. ..., 170 So. 2d 424 .....12, 14
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836..... 35
Morgan v. Embry, 85 So. 580, 17 Ala. App. 276 38
Peabody v. State, 246 Ala. 32, 18 So. 2d 693..... 26

Phifer v. City of Birmingham, 42 Ala. App. 282, 160 So. 2d 898, 901 .....3, 13, 14, 17, 24, 31, 33
Pierce v. U. S., 40 S. Ct. 205, 252 U. S. 239, 64 L. ed. 542, affirmed 245 F. 878 37
Portland R. L. & P. Co. v. Railroad Commission, 229 U. S. 397, 33 S. Ct. 829, 57 L. ed. 1248..... 35
Shuttlesworth v. City of Birmingham, 42 Ala. App. 296, 161 So. 2d 796, 797 34
Smith v. McLaughn, 184 P. 2d 177, 81 Cal. App. 2d 815 37
State v. Sugarman, 126 Minn. 477, 148 N. W. 446.. 14
Tarver v. State, 85 So. 855, 17 Ala. App. 424..... 35
Thompson v. City of Louisville, 362 U. S. 199, 80 S. Ct. 624, 4 L. ed. 2d 654 35
Thornhill v. State of Alabama, 310 U. S. 106, 60 S. Ct. 737 28
Tinsley v. City of Richmond, 202 Virginia 707, 119 S. E. 2d 488, app. dismissed, 368 U. S. 18....14, 21, 22
Turnipseed v. Burton, 4 Ala. App. 612, 58 So. 959 ... 38
U. S. v. Parillo, 299 F. 714 37
United States v. Harris, 347 U. S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989 .....25, 28
United States v. Raines, 362 U. S. 17, 80 S. Ct. 519, 522 30
Wages v. State, 25 Ala. App. 84, 141 So. 709, Cert. denied 225 Ala. 10, 141 S. 713 26
Webb v. Litz, 39 Ala. App. 443, 102 So. 2d 915..... 14
Western Railway of Alabama v. Arnett, 34 So. 997, 1000 last paragraph, 137 Ala. 414..... 14
White Roofing Co. v. Wheeler, 106 So. 2d 658, 39 Ala. App. 662, cert. denied 106 So. 2d 665, 268 Ala. 695 38
White v. City of Birmingham, 41 Ala. App. 181, 130 So. 2d 231 13
White v. Jackson, 62 So. 2d 477, 36 Ala. App. 643 ... 38
Whitney v. California, 274 U. S. 397, 47 S. Ct. 641, 71 L. ed. 594 35

Williams v. State of Georgia, 349 U. S. 375, 99 L. Ed. 1161 15
Wright v. State of Georgia, 373 U. S. 284, 83 S. Ct. 1240 15
Yeats v. Mooty, 175 So. 719, 128 F. Ca. 658 37

Statutes Cited.

Birmingham General City Code of 1944:
Section 1142 .....2, 3, 8, 9, 11, 16, 26, 27
Section 1231 .....3, 9, 16, 27

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 5.

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM.

On Writ of Certiorari to the Court of Appeals of the State of Alabama.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

Respondent feels the statements of "questions presented" by petitioner are in some material degree inaccurate or misleading and should be rephrased.

1. Whether as applied to one who is a member or part of a group of ten or twelve persons standing or loitering on a sidewalk on a corner in the heart of the business district of a city so as to block or interfere with free passage of other pedestrians and force them out into the

street occupied by vehicular traffic, absent any question or issue of free assembly or free speech, an ordinance aimed at promoting free flow of traffic and making it an offense to continue to so stand or loiter after having been requested by a policeman to move is vague and overbroad in violation of the Fourteenth Amendment.

2. Whether as applied to one described in question one, the two sentences of a paragraph of an ordinance entitled "Streets and sidewalks to be kept open for free passage," and construed by a state court to state a single offense, may nevertheless be separated into two elements and as thus severed successfully attacked for vagueness or overbroadness as though two separate offenses were involved, one for obstructing free passage and the other for refusing to heed the request of an officer to move.

3. Whether one described in questions one and two above, who is tried on a complaint containing two counts, the first of which charges violation of the ordinance referred to in questions one and two, and the second count charging violation of an ordinance construed by the state court as making it an offense to refuse or fail to comply with an order concerning vehicular traffic, can sustain a contention that due process is lacking for total absence of evidence to support count two in violation of due process, and if so a reversal of the general conviction on the complaint as charged where the penalty for only one offense is assessed is warranted.

STATEMENT OF CASE.

Petitioner was charged and convicted in Alabama Circuit Court on a complaint containing two counts. The first count charged the blocking or obstructing of free passage on the sidewalk and failure to cease such blocking or obstructing free passage after request by a police officer to do so as proscribed by Section 1142 of the General City Code of 1944. The second count charged failure

to obey a reasonable and lawful order of a police officer in violation of Section 1231 of such Code. This section was construed by the Court of Appeals of Alabama to be limited to lawful orders having relation to vehicular traffic upon the street. **Phifer v. City of Birmingham,** 42 Ala. App. 282, 160 So. 2d 898, 901.

That court construed 1142 as not involving in its application in this case any question of free speech, and upheld its constitutionality as thus applied in this case. The tendencies of the evidence of the City was summarized and held sufficient to sustain a conviction but in which only one sentence was imposed under Counts one and two.

The findings of the Court of Appeals both that the petitioner was in violation of 1142 by blocking or obstructing free passage upon the sidewalk and failing to clear the blockage or obstruction after being requested by a police officer to do so and that no first amendment freedoms were involved in the incident in the nature of free speech or free assembly is amply supported by the record. Also we feel the evidence was sufficient to support a conviction under Count two relating to 1231.

We here make reference to the evidence in the record which we feel fully supports the conclusion of the Court of Appeals of Alabama.

The following facts were established by the evidence introduced in the trial court. On April 4, 1962, at about 10:30 A. M., Officer Robert E. Byars, Jr., observed the petitioner, along with James Phifer and three or four other people walking south on 19th Street toward 2nd Avenue, North, Birmingham, Alabama (R. 16, 19). Officer Byars then entered Newberry's Department Store at its alley entrance and walked to the front of the store at 19th Street and 2nd Avenue, North (R. 16, 17). When he got to the front entrance he saw the petitioner standing in a group of ten or twelve people (R. 17, 27, 38). They

were on the northwest corner of 2nd Avenue and 19th Street (R. 17, 27, 40, 59). The group was standing (R. 17, 38). The traffic light changed a number of times while they stood there at the intersection (R. 36). The group blocked pedestrian traffic to such an extent that some people walking east on the north side of 2nd Avenue had to walk into the street, thereby interfering with vehicular traffic[1] (R. 17, 20, 28, 39). Petitioner was a member of this group (R. 17, 18). Officer Byars watched the group for a minute to a minute and a half before accosting them (R. 18, 26, 28). Officer Byars then walked up to the group and informed them they would have to move on and clear the sidewalk so as to allow free passage of pedestrian traffic and not obstruct the sidewalk (R. 18, 27, 28). While Officer Byars was talking to the group he was observed by Officer James Paul Renshaw, a police patrolman on motorcycle (traffic) duty (R. 40, 43, 47). Officer C. W. Hallman, a traffic policeman (R. 59), Officer John D. Allred, police patrolman also on traffic duty (R. 66, 70), and Cecil W. Davis, a traffic officer (R. 73, 74).

When Officer Byars first spoke to the group requesting them to move (R. 28, 31, 41, 47, 49), only a small part moved. Petitioner did not move (R. 18, 41, 49, 60). After a short while, the officer informed the group a second time they would have to move and not obstruct the sidewalk in order to permit pedestrian traffic to move unhampered (R. 18, 28). Petitioner and some others in the group did not move and petitioner stated: "You mean to say we can't stand here on the sidewalk?" (R. 18, 28.) Officer Byars did not do or say anything for a short period and then he told the group that he was telling them the third and last time to move or they would be arrested for obstructing the sidewalk (R. 18, 41, 60). Petitioner

[1] The only logical conclusion to be drawn from the testimony of the witnesses that pedestrians were forced into the street is that such pedestrians interfered with vehicular traffic in the street.

was still in the group (R. 18, 28, 41, 49, 59, 60, 74). Everybody began to move but him (R. 28). Petitioner did not move but made the statement "You mean to tell me we can't stand here in front of this store?" (R. 18.) Officer Byars then informed petitioner that he was under arrest, after which time petitioner moved away saying: "Well, I will go into the store" (R. 18, 20, 41, 52). Officer Byars followed petitioner into Newberry's store and took him into custody (R. 18, 19).

Officer Byars had heard that a boycott or selective buying campaign was in progress at the time he arrested petitioner, but he had not been informed by his superiors that such boycott or selective buying campaign was going on and received no assignment relating to it (R. 24, 25). Officer Byars did not know either petitioner or James S. Phifer, co-defendant in Circuit Court, at the time he arrested them (R. 16, 22, 23). In fact, this is corroborated by Robert J. Norris, a defense witness when he testified that Officer Byars never called petitioner by name (R. 99). In fact, even petitioner adimts that Officer Byars did not call him by name.

Officer James P. Renshaw, who was going south on 19th Street between 3rd Avenue and 2nd Avenue (R. 40), testified he saw the group talking to Officer Byars. Officer Renshaw was on a motorcycle and he got off and went to Officer Byars (R. 41). Officer Renshaw reached Officer Byars in time to hear him tell the group the third time to move (R. 41, 49). Officer Renshaw was present when petitioner was arrested (R. 52), but he did not assist in the arrest (R. 48). No one assisted Officer Byars in making the arrest.[1] Officer Renshaw testified that there were

[1] While Officer Renshaw testified that he assisted Officer Byars in the arrest, elaboration of his testimony revealed his assistance consisted of nothing more than being present (R. 48). In fact, the petitioner admitted that Officer Byars was the arresting officer (R. 112, 113) and this was corroborated by James S. Phifer (R. 128).

about eight or ten or twelve people in the crowd when told the third time to move (R. 49) and that some may have moved off at the time. Officer Byars told petitioner he was under arrest (R. 52). Officer Renshaw had heard that the Negroes of the City of Birmingham were engaged in a selective buying campaign but he knew of no orders issued by his superiors concerning such campaign (R. 43, 44). At the time Officer Byars arrested petitioner, Officer Renshaw knew petitioner but didn't know James Phifer (R. 40). Although he didn't know James S. Phifer by sight he knew he was a notorious person in the field of civil rights in the City of Birmingham (R. 46).

Officer Hallman testified that he was a traffic policeman working traffic at the intersection of 2nd Avenue, North, and 19th Street (R. 59). He first saw the group talking to Officer Byars (R. 59). When he first saw the group he was talking to Officer Davis about a message to call his (Officer Hallman's) home (R. 59, 61). Officer Hallman and Davis arrived in time to hear him say to the group, "I am telling you for the third time you will have to move on, you are blocking the sidewalk" (R. 59). There was still five or six in the group and they all moved away except petitioner (R. 60) and Officer Byars then arrested petitioner (R. 60). At the time of petitioner's arrest Officer Hallman had heard about a selective buying campaign but had heard nothing from his superiors concerning such campaign (R. 63).

Officer John D. Allred, patrol division on traffic duty, testified he had left roll call (R. 69) and was on his way to 3rd Avenue and 20th Street (R. 66, 68, 69) where he was to work traffic (R. 66, 68). He was about twenty-five or thirty feet south of the alley by Newberry's and was giving directions to some people when he first heard Officer Byars tell the group they would have to move on (R. 66, 69). Officer Allred did not go to Officer Byars until after the arrest of petitioner but continued to give

directions to the people he was talking to (R. 67, 70). Officer Allred estimated the size of the group at maybe ten or fifteen or twenty people (R. 71).

At the time of petitioner's arrest Officer Allred did not know petitioner (R. 68).

Officer Cecil W. Davis testified he was patroling parking meters on a motorcycle (R. 76) but at the time he first observed the group talking to Officer Byars he was delivering a message to Officer Hallman (R. 77). Officer Davis was with Officer Hallman when he first observed the group with Officer Byars (R. 73). He testified there was about ten or twelve in group (R. 74). Officer Davis crossed the street to where Officer Byars was in time to hear him tell petitioner he was under arrest (R. 74), and there was still a crowd around petitioner at that time (R. 74). He heard Officer Byars tell petitioner he was under arrest (R. 74). At the time of petitioner's arrest Officer Davis had heard about the selective buying campaign but no one at police headquarters had discussed it with him (R. 78). Officer Davis knew both petitioner and James S. Phifer.

The evidence is without dispute that Byars did not know Shuttlesworth prior to the arrest (R. 29) nor did Shuttlesworth know Byars (R. 113). Byars did not address Shuttlesworth by name (R. 112).

Byars did not know Phifer prior to the arrest (R. 16, 22-23). Byars also was not known to Phifer (R. 128). Officer Byars was on traffic duty and had no assignment relating to the boycott he had heard was supposed to be in progress (R. 24).

No claim is made by petitioner or his witnesses of any activity involving freedom of speech or assembly. As Shuttlesworth expressed his version of the incident they were walking as pedestrians walk and simultaneously as they approached the light at the corner the officer came out of the door and said "move on" (R. 111, 112).

SUMMARY OF ARGUMENT.

I.

Count one of respondent's complaint charged petitioner with violation of Section 1142 of the General Code of Birmingham. Count two of respondent's complaint charged petitioner with violation of Section 1231 of the General Code of Birmingham. Each section and each count based thereon embrace a single offense. Petitioner argues that if either count is based on a constitutionally vulnerable section his conviction should be reversed. Both sections are however, constitutionally valid. In addition to this, however, petitioner has not followed the proper state court procedures to raise the question insofar as Section 1231 is concerned and this Honorable Court should not even consider the validity of this section.

II.

Section 1142 of the General Code of Birmingham insofar as it makes it unlawful to stand or loiter on any sidewalk of the city after having been requested by a police officer to move on is neither vague, overbroad, nor constitutionally objectionable. As written the ordinance does not give policemen absolute or arbitrary power to order any citizen off the streets. As written it is a valid police regulation. Neither the provisions of Section 1142 nor its construction and application in this case involve free speech or any other freedoms protected by the First-Fourteenth Amendments. Section 1142 gives fair notice of its proscriptions. The Alabama Court did not construe this section as shifting the burden of proof to the defendant to disprove that he was loitering so as to obstruct free passage.

III.

Section 1142 of the General Code of Birmingham, insofar as it makes it unlawful to so stand, loiter, or walk on any sidewalk in the city as to obstruct free passage thereon is not vague and overbroad. This provision does not involve any first amendment freedom and it has not been construed to apply to any such situation.

IV.

The conviction of petitioner for violation of Section 1231 of the General Code of Birmingham, making it unlawful to refuse to comply with a lawful police order is based on ample evidentiary support, but even if it were held otherwise, reversal of the conviction of petitioner would not be warranted because his conviction is sustained under Count one.

ARGUMENT.

I.

Point I of Petitioner's Argument Is Without Merit.

Petitioner in this section of his argument argues that the complaint charged two separate offenses in Count One and a third offense in Count Two with the conclusion that reversal should follow if either is constitutionally vulnerable.

In reply to the contention of petitioner in Section 1 of his Argument, pages 13 and 14 of his brief, citing **Stromberg v. Carlson; Williams v. North Carolina,** and **Thomas v. Collins,** we take the position that the principle of these cases cannot be given application in the manner employed to make two charges out of Count One, which is based upon Ordinance 1142, nor to present for review the Constitutionality vel non of Ordinance 1231.

First, the holding of these cases is simply that where a conviction is upheld in a state appellate court on pleadings charging more than one violation, the verdict or judgment being general, and it being impossible to know whether the conviction was upon the one charged or the other, the conviction will be reversed if any of the charges are unconstitutional, because the conviction may have been based thereupon.

The record in this case clearly shows in respect to count one that only one charge was lodged against petitioner under this count. Neither the trial court nor the Alabama Court of Appeals, nor the City, nor anyone, prior to certiorari to this Honorable Court, ever mentioned, or so far as we know, ever imagined or speculated that the petitioner was charged with loitering or standing upon the sidewalk so as to obstruct free passage

thereupon and also with merely standing or loitering on the sidewalk after being requested to move on.

No mention of such contention was ever made in any demurrer or other pleading filed by petitioner nor at any other time so far as the record shows.

The complaint filed by the attorney and upon which Shuttlesworth was tried connects and ties the two sentences of the last paragraph of 1142 together in one charge.

Count one[1] charges defendant loitered upon the sidewalk, a member of or within a group which obstructed free passage or did loiter or stand while in said group (we interpolate, the group loitering or standing to block free passage on the sidewalk) after having been requested by a police officer to move on.

There can be no doubt whatsoever that the Alabama Court of Appeals construed the ordinance and the complaint to charge both a blocking or obstruction of free passage and also a failure to move after having been requested to do so by a police officer. The evidence summarized by the court spelled out both elements of obstructing and request to move.[2]

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[1] Count One. "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at, to-wit: 2nd Avenue North, at 19th Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F" (R. 2-3).

[2] We have quoted this summary on page 34 of this brief.

In the case of **Middlebrooks v. City of Birmingham**, . . . Ala. App. . . ., 170 So. 2d 424, the Alabama Court of Appeals followed the construction in the Phifer and Shuttlesworth cases, of the second paragraph of Section 1142, in the following language:

> "This is the fourth case in the last year wherein this court has considered the second paragraph of Section 1142 as amended. That provision is directed at obstructing the free passage over, on or along a street or sidewalk by the manner in which a person accused stands, loiters or walks thereupon. Our decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense."
>
> "That there must also be a showing of the accused's blocking free passage is the ratio decidendi of **Phifer v. City of Birmingham**, 42 Ala. App. 282, 160 So. 2d 898, and **Shuttlesworth v. City of Birmingham**, 42 Ala. App. 296, 161 So. 2d 796. In this respect, we distinguish our reasoning from that employed by the Virginia Supreme Court of Appeals in **Tinsley v. City of Richmond**, 202 Va. 707, 119 S. E. 2d 488."

Under this construction it is clear that only one offense is contained in the second paragraph of Section 1142 as amended. As construed, this Section is a reasonable exercise of the state's police power and is constitutionally valid. This construction placed on this ordinance in the Phifer, Shuttlesworth and Middlebrooks cases is also binding upon this Honorable Court. The rule in this regard has been stated in **Garner v. State of Louisiana**, 82 S. Ct. 298, 368 U. S. 157, as follows:

> "Whether the state statutes are to be construed one way or another is a question of state law, final decision of which rests of course with the Courts of the State."

As to Ordinance 1231, and as to which we feel only a very general and possibly no serious effort was made in petitioner's brief to attack its constitutionality we respectfully urge the record does not present its constitutionality for review. The method sought to be employed to raise the constitutional question in the trial court was by motion to quash and demurrer. The Court of Appeals of Alabama did not reach for consideration its constitutionality because of the failure of petitioner to comply with state court procedural requirements. Petitioner on page 11 of his brief concedes this.[1]

In the Shuttlesworth case, the Alabama Court of Appeals adopted its ruling in the companion, **Phifer**, case, with respect to the assignments relating to the motion to quash and the ruling on demurrer, and did not further deal with these assignments of error.

The Court of Appeals of Alabama held in the **Phifer** case, 160 So. 2d 898, 42 Ala. App. 282, ruling on motion to quash was not reviewable on appeal. **White v. City of Birmingham**, 41 Ala. App. 181, 130 So. 2d 231.

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[1] "In Phifer, the Alabama Court of Appeals sustained the overruling of a motion to quash and demurrers by petitioner Shuttlesworth's co-defendant below, these documents being identical to those filed on behalf of Shuttlesworth. Phifer's constitutional attack on Section 1142, the loitering ordinance, was rejected on the merits; Phifer's challenge to Section 1231 was not reached, because While the demurrer in its caption is directed to the complaint "and to each and every count thereof, separately and severally," it is really interposed to the two counts of the complaint jointly.' 42 Ala. App. at ...., 160 So. 2d at 900. Whatever the force under state law of this esoteric ruling that a paper expressly captioned 'several' is to be deemed 'joint', it is clear that the ground is insufficient to bar this court's review on the merits of the attack on Section 1231. Any 'objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore, sufficient to preserve the claim for review here.' Douglas v. Alabama, 380 U. S. 415, 422, see Henry v. Mississippi, 379 U. S. 443 (1965). In any event, the matter is immaterial because petitioner's attack on Section 1142 is dispositive of the case. See pp. 17-18 infra."

The assignment of error relating to the ruling on demurrer was overruled for the reason both that the several grounds of demurrer assigned were so broad in scope as to embrace the whole complaint,[2] and the assignment of error was so broad as to embrace the whole complaint. Consequently the demurrer and the assignment of error based on the ruling on it could be sustained only if the complaint was bad in its entirety and as to each count.

These principles of procedural law have been well established and uniformly applied by the Appellate Courts of Alabama over a half century. **Cahaba Coal Co. v. Elliott**, 62 So. 808, 810, 183 Ala. 298; **Allison-Russell Withington Co. v. Sommers**, 121 So. 42, 219 Ala. 33; **Western Railway of Alabama v. Arnett**, 34 So. 997, 1000 last paragraph, 137 Ala. 414; **Howison v. Oakley**, 23 So. 810, 118 Ala. 215; **Webb v. Litz**, 39 Ala. App. 443, 102 So. 2d 915.

The Alabama Appellate Court did discuss the constitutional attack upon the last paragraph of 1142 and found that it was not aimed at free speech, but was a legitimate exercise of police power by the municipality to enact and enforce reasonable regulations for the control of traffic and the use of its streets and sidewalks.

In support of this conclusion the Alabama Court cites decisions from other states including Washington, Virginia and California.[3] In Section II of this brief we shall

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[2] The Court of Appeals set out the grounds of demurrer challenging the ordinances in the *Phifer* case. It is clear that each of the grounds attacked both ordinances 1142 and 1231 in the conjunctive and therefore were directed to both counts. *Phifer v. City of Birmingham*, 160 So. 2d 898, 899.

[3] City of Tacoma v. Roe, 190 Wash. 444, 68 P. 2d 1028; Benson v. City of Norfolk, 163 Va. 1037, 177 S. E. 222; Ex Parte Bodkin, 86 Cal. App. 2d 208, 194 P. 2d 588. Other cases which might also have been appropriately cited include: Minnesota, State v. Sugarman, 126 Minn. 477, 148 N. W. 446; Pennsylvania, Challis v. Pennsylvania, 8 Pa. Sup. 130, 132; Iowa, City of Chariton v. Fitzsimmons, 54 N. W. 146, 87 Iowa 226; and also the later Virginia case, Tinsley v. City of Richmond, 202 Virginia 707, 119 S. E. 2d 488, app. dismissed, 368 U. S. 18.

attempt to elaborate upon the correctness of the ruling of the Court of Appeals sustaining the constitutionality of 1142.

To return to Count two involving 1231, the United States Supreme Court has recognized the right of the State Court to apply reasonable procedural rules of the state even to the point that it may properly decline to rule on a constitutional question and when it does in good faith apply consistently and uniformly a well established procedural rule the constitutional question is not before the United States Supreme Court. **Barbour v. State of Georgia,** 248 U. S. 454, 39 S. Ct. 316; **Herndon v. State of Georgia,** 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, rehearing denied 56 S. Ct. 82, 296 U. S. 661, 80 L. Ed. 471; **Hiawassee River Power Co. v. Carolina Tennessee Power Co.,** 252 U. S. 341, 40 S. Ct. 330; **Williams v. State of Georgia,** 349 U. S. 375, 99 L. Ed. 1161.

More recent decisions of this court in **Douglas v. State of Alabama,** 380 U. S. 415, 422, 85 S. Ct. 1074, and **Henry v. State of Mississippi,** 379 U. S. 443, 85 S. Ct. 564, are cited in the last sentence of footnote 9 on page 11 in petitioner's brief quoted by us in footnote 3 on page 13, ante. These cases and older cases such as **Wright v. State of Georgia,** 373 U. S. 284, 83 S. Ct. 1240, and **Davis v. Wechsler,** 263 U. S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143, recognize the right of this Honorable Court to examine the procedural rule in question and determine if any reasonable State interest is conserved by the application of the procedural rule and whether it may in fairness be invoked.

We think the ancient rules applied in this case were fairly and properly applied. It is of interest that after citing the first two of the above cases, petitioner indicates he is not pressing for the application of these cases here, but chooses to rely instead on his claim of unconstitution-

ality of 1142.[4] This minimizing of reliance upon these cases seems to be implicit in the strategy employed in Section IV of petitioner's brief in which he addresses his argiment primarily to a claimed lack of evidence to support a conviction on this count and the statement[5] made on page 29 of his brief that but for the restrictive construction placed on 1231 by the Court of Appeals of Alabama, it would be subject to the vices he claims inheres in 1142.

Point II (A & B) of Petitioner's Argument Are Each Without Merit.

II-A.

THE LAST SENTENCE OF 1142 IS NOT VAGUE OR OVERBROAD.

Petitioner in this section of his argument seeks reversal of the conviction of petitioner by attempting to split the last paragraph of Ordinance 1142 in half and to separate the last sentence from the first sentence and in so doing contends that such sentence is over broad and in violation of the First and Fourteenth Amendments.

We have already in Section I of this brief presented our contention that this artificial attempt to split this paragraph into separate charges is not permissible in this case. The charge made against petitioner in Count one and proven by the City's evidence was that he, together with or in a group of ten or twelve blocked or obstructed

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[4] "In any event, the matter is immaterial because petitioner's attack on Section 1142 is dispositive of the case. See pp. 13-14 infra." Pet. brief, p. 11.

[5] "If construed as broadly as it is written, Birmingham Code 1231, making it 'unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer,' would be objectionable for the reasons stated in pp. 14-15, supra. The Alabama Court of Appeals, however, has put a quite narrow construction on the section." Pet. brief, p. 29.

free passage on the sidewalk and failed to move and clear the sidewalk for free passage after having been requested to do so by the officer on three separate occasions.

The ordinance in question, either considering the last paragraph as containing one or two proscriptions, was not in this case construed to prohibit or interfere with freedom of speech or any other amendment one freedoms or rights. The Court of Appeals of Alabama expressly stated they were not applying it to any situation involving such constitutionally guaranteed freedom. **City of Birmingham v. Phifer**, 42 Ala. App. 282, 160 So. 2d 898, 900:

> "Section 1142, as amended, of the General City Code of Birmingham, is not aimed at free speech. It directs the manner in which sidewalks and streets may not be used. A municipality has the right under its police power to enact and enforce reasonable regulations for the control of traffic and the use of its streets and sidewalks."

On its face and under the construction placed upon 1142 it proscribes conduct, not a facet of freedom of speech and assembly, which results in obstructing the free and unimpeded use of the sidewalks and streets for pedestrians and vehicular traffic respectively.

No contention was made at any time that Shuttlesworth and his associates were involved in any facet of free speech or free assembly on the occasion of his arrest. The record clearly negates any such claim. Petitioner and each of his witnesses claimed that they were merely walking along the sidewalk as any other citizen to get from one point in the City to another. There was no demonstration. There was no picketing. There was no parading. There was not even any hint of any activity involving freedom of speech or assembly or any other first amendment freedom.

All that is here involved is the simple right of the municipality under its police power to control and regulate the use of its sidewalks and streets as passageways to permit pedestrians and vehicular traffic a safe, proper and unimpeded use thereof.

The constitutionality of 1142 must be tested in this case by the principle given application by this Honorable Court in **Cox v. New Hampshire,** and **Cox v. Louisiana,** 379 U. S. 536, 85 S. Ct. 453.

These cases illustrate the principle long adhered to by this Honorable Court that unless by its express language or by construction placed upon it by the state courts, an ordinance or statute impinges upon the first amendment freedoms, such ordinance or statute is not unconstitutional when its application is limited to simply conserving public convenience and safety in the use of sidewalks and streets for the purpose they were designed.[1]

In **Cox v. Louisiana,** a statute[2] on its face aimed at free and unobstructed passage upon public sidewalks and streets was construed by the Supreme Court of Louisiana

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[1] Mr. Justice Goldberg in the majority opinion in Cox v. Louisiana recognizes that even freedom of speech and assembly may have to give way to overpowering public convenience and safety in use of the streets (Headnotes 11-13).

[2] "Obstructing Public Passages. No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, water craft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.

"Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions."

to be applicable in a first amendment situation involving a civil rights demonstration.[3] Because of this construction by the Louisiana Court, this Honorable Court held the statute as thus applied to **Cox** to be unconstitutional and reversed his conviction.

> "(19) It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" * * * (and with) a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways * * *."' Cox v. State of New

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[3] In *Cox* there appeared to be no statute providing for peaceful parades or demonstrations. The 1944 General City Code of Birmingham made provision for peaceful parades or demonstrations in Section 1159:

"Sec. 1159. Parading. It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions."

Hampshire, supra, 312 U. S. at 576, 61 S. Ct. at 766. See Poulos v. State of New Hampshire, supra.

"(20) But here it is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment. It follows, therefore, that appellant's conviction for violating the **statute as so applied and enforced must be reversed.** (Emphasis supplied.)

"For the reasons discussed above the judgment of the Supreme Court of Louisiana is reversed." **Cox v. Louisiana,** 85 S. Ct. at page 466.

The statement from **Cox v. Louisiana** above quoted serves to distinguish that case from the present one. It also serves to distinguish a host of other cases relied upon by petitioner in his brief. Most of these are referred to by Mr. Justice Goldberg in his statement (85 S. Ct. 453, at page 464):

"(10) Appellant, however, contends that as so construed and applied in this case, the statute is an unconstitutional infringement on freedom of speech and assembly. This contention on the facts here presented raises an issue with which this Court has dealt in many decisions. That is, the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly. See Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; Hague v. CIO, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Thornhill v. State of

Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; Largent v. State of Texas, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513; Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325, 328, 95 L. Ed. 267, 280; Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280; Poulos v. State of New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105."

Petitioner also contends that this ordinance failed to give him fair notice as to its proscriptions. The enactment here treated by petitioner as the "ordinance" is the last sentence of Section 1142:

> "It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move."

Even if this sentence is taken out of context and separated from the first sentence it is still a valid enactment. An enactment almost identical to the above was considered in the case of **Tinsley v. City of Richmond,** 202 Va. 707, 119 S. E. 2d 488. In that case as in this one, the attack was directed at the vagueness, ambiguity and lack of standards in the ordinance.

It is admitted by the opinion in Tinsley that the ordinance does confer discretionary power on police officials but the court pointed out the following exception:

> "We have, however, also recognized a well established exception to this rule. This exception applies in instances where it is difficult or impractical to lay

down a definite or comprehensive rule, or where the discretion relates to the administration of a police regulation and is essential to the public morals, health, safety and welfare."

Another statement of this rule is found in **Tinsley** where it quotes 12 A. L. R. 1435:

"It is also well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but, on the other hand, some situations require the vesting of some discretion in public officials, as for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare."

The general scope and authority of a police officer in giving orders in the performance of his duties is discussed in State v. Taylor, 119 A. 2d 36, 38 N. J. Sup. 6, in the following language:

". . . The duty of police officers, it is true, is 'not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In performance of their duties they may give reasonable directions.' **People v. Nixon**, 248 N. Y. 182, 188, 161 N. E. 463, 466. Then they are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty. The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere

with the public order and lead to a breach of the peace." **People v. Galpern**, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785 (Ct. App. 1932).

"Failure to obey a police order to 'move on' can be justified only where the circumstances show conclusively that the order was purely arbitrary and was not calculated in any way to promote the public order. As was said in the Galpern case, the courts cannot weigh opposing considerations as to the wisdom of a police officer's directions when he is called upon to decide whether the time has come in which some directions are called for."

Certainly in the handling of unforeseeable events officers should be given reasonably broad discretionary powers. This is especially true in the realm of traffic. Such ordinances afford sufficiently definite standards under the circumstances and are neither vague nor overbroad.

Another question raised by petitioner is whether he was in violation of Section 1142 at the time of his arrest, because at that time the crowd was either moving or had moved. Thus, contends petitioner the reason for his arrest was either gone or leaving. This however is no justification. If petitioner, the leader of the group, had this right then every other person in this crowd had the same right and if every other person had this absolute right then no right could rest in the City to regulate traffic on its sidewalks. It is only logical to assume that if petitioner had been permitted to defy the officer[1] and remain, his companions would have construed this as an open invitation to rejoin him. Certainly if he had the right to defy the order then each of the others in the crowd had an

[1] The testimony shows that petitioner was not seeking information but was making statements in defiance of the officer (R. 18, 20, 41, 52).

equal right. Obviously such a situation would be intolerable and gives justification to the rule that:

> "... police officers of a municipality should have reasonable authority and discretion. Indeed, in exigencies, it is vital to the welfare of the community."[2] Benson v. City of Norfolk, 163 Va. 1037, 177 S. E. 222.

II-B.

THE LAST PARAGRAPH OF 1142 IS NOT VAGUE OR OVERBROAD.

Petitioner in this section of his argument seeks reversal of the conviction by attempting to attack the constitutionality of 1142 as construed by the Alabama Court of Appeals to constitute but one offense to require proof of both obstructing free passage and also failure to move upon request of a police officer.

As heretofore noted in this brief, the last paragraph of Section 1142 has been construed to contain a single offense, proof of which requires evidence that the accused blocked free passage of a public sidewalk and evidence of his refusal to move on after a police officer's request. **City v. Shuttlesworth,** 42 Ala. App. 296, 161 So. 2d 796; **Middlebrooks v. City of Birmingham,** ... Ala. App. ..., 170 So. 2d 424; **Phifer v. City of Birmingham,** 42 Ala. App. 282, 160 So. 2d 898. Respondent now directs its argument to sustaining the validity of Section 1142 as construed by the Appellate Courts of Alabama.

Petitioner's first attack on Section 1142 is that the construction of this ordinance post-dates petitioner's convic-

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[2] The inevitable consequences of the implications of petitioner's argument in *Shuttlesworth* is that he has a constitutional right to defy a police officer in performance of his duty, a doctrine, we submit, which tends to encourage and may well lead to rioting, destruction of property, in the hundreds of millions, violence, and death of scores of innocent people.

tion in Circuit Court. In this regard he relies upon **Bouie v. City of Columbia,** 84 S. Ct. 1697, 378 U. S. 347. The **Bouie** case, however, is not applicable in this case. The rule espoused in **Bouie** is simply that a statute written in such narrow language as to give no fair notice to defendant that his conduct is proscribed cannot be subsequently enlarged by judicial construction to cover his conduct. Actually the specific rule of **Bouie** is just a different application of the following rule taken from **United States v. Harris,** 347 U. S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989, and adopted by **Bouie:**

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Section 1142 gives fair notice to any person of ordinary intelligence that obstructing free passage on a sidewalk and refusing to obey an officer's request to move on is illegal. The construction placed on this ordinance by the Alabama Court is the only logical construction that could be placed upon it.

The Court of Appeals in construing this ordinance utilized rules of statutory construction designed solely to reach the most logical reasonable construction. These rules were formulated to give a certain amount of guidance to courts in their efforts to place logical and proper construction on statutory enactments. They were designed to insure that parties **affected** by statutes would have the benefit of consistently logical construction. As stated in **Blair v. Greene,** 246 Ala. 28, 18 S. 2d 688:

". . . (I)n the construction of a statute, the legislative intent is to be determined from a consideration of the whole act with reference to the subject matter to which it applies, and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately. This is in effect the statement as found in 59 C. J., p. 993, and recognized as the correct principle by numerous decisions of this court." The Alabama Supreme Court in **Peabody v. State**, 246 Ala. 32, 18 So. 2d 693, also applies this rule.

Certainly the rule above does no more than require those persons coming within the purview of statutory enactments to use common sense in reading them. Unless one completely blinds himself to the total effect of this enactment, no other conclusion can be reached other than the one reached by the Appellate Courts of Alabama.

The title of this ordinance is an aid in its construction. **Wages v. State**, 25 Ala. App. 84, 141 So. 709, Cert. denied 225 Ala. 10, 141 S. 713. The title of Section 1142 as amended reads:

"Streets and sidewalks to be kept open for free passage."

Certainly anyone reading the title of this ordinance would know that its subject was obstructing sidewalks. Anyone reading the entire ordinance would know that both sentences, the first and second relate specifically to some form of blocking traffic on the sidewalks and streets and any order to move would be authorized only when the first condition existed. It is only when the last sentence in this section is lifted and taken completely out of context that the possibility of a different construction

appears.[1] Appellant in this case, if he read the ordinance, could not come to any conclusion other than the one reached in the Middlebrooks, Phifer and Shuttlesworth cases. He was given fair notice of its proscription.

In reply to the several references by petitioner in his brief to the application of the prima facie rule and the conclusion reached that viewing Ordinance 1142 as proscribing but one unlawful act of obstructing and failing to move after obstructing passage on the sidewalk, the Court would during trial presume obstructing from the mere giving of the request to move, we feel such conclusion is erroneous. This erroneous conclusion is stated on pages 22 and 23 of petitioner's brief.

The **Shelton** case there mentioned dealt not with 1142, but the vehicular traffic section 1231. The **Middlebrooks** case dealt with an obstruction of the free passage on a sidewalk, not in connection with a demonstration, but after it was concluded. It is true, mention was made of the **Shelton** case, but the Court of Appeals was unanimous in its opinion that the evidence proved all of the elements of the offense under 1142 without resorting to any question of burden of proof.

It is also important to remember that in this, the Shuttlesworth case, the Court of Appeals found from the evidence the City had proved both of the elements required to constitute the offense. Shuttlesworth could not complain of such a rule, if such a rule exists, because it obviously was not applied to his case in the decision of that court in opinion written by Judge Cates.

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[1] The fact that the last sentence in Section 1142 as amended was not a separate paragraph also is evidence that the request to move mentioned therein necessarily relates to a failure of one who is blocking or obstructing free passage to move after request to do so by a police officer.

Petitioner also contends that Section 1142 is like the ordinance declared invalid in **Ex Parte Bell**, 19 Cal. 2d 488, 122 P. 2d 22. It is true that the two ordinances have some similarities, but the holding in Shuttlesworth and Bell are easily distinguished. **Ex Parte Bell** dealt with an ordinance that regulated picketing, which is a form of free speech protected by the Constitution. **Thornhill v. State of Alabama**, 310 U. S. 106, 60 S. Ct. 737. The Alabama Court of Appeals holds:

> "Section 1142, as amended, of the General City Code of Birmingham is not aimed at free speech. It directs the manner in which sidewalks and streets may not be used."

Absent the question of infringement of First Amendment freedom of speech, assembly or press,[1] the only requirement of specificity is that required to meet the due process requirements of the Fourteenth Amendment which is stated in **Bouie**, which quotes from the earlier case of **United States v. Harris**, 347 U. S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989, which we have quoted ante page 25. This rule may be summarized as simply requiring that a defendant shall have reasonable notice of any act proscribed and for which a penalty might be inflicted upon him.

The ordinance here in question proscribing obstruction of free passage on a sidewalk and requiring the violator to move upon request of a police officer is as definite as the nature of such ordinance allows. Any person of reasonable intelligence could understand its prohibitions.

Petitioner speculates that specific situations could arise in which a person could be arrested for window shopping or some other similar conduct and, if so, the police officer

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[1] See Fort v. Civil Service Comm. of Alameda County, 38 Cal. Rptr. 625, 392 P. 2d 385.

would be applying the ordinance in an unconstitutional manner. No one could deny that this or any ordinance might be used improperly. But this fact could not condemn an ordinance designed to accomplish a legitimate control of the use of the streets and sidewalks to the end that they might perform the main function for which they were created.

The language of another California Appellate Court, **Ex Parte Bodkin**, 194 Pac. 2d 588, 591, 86 Cal. App. 2d 208, is particularly appropriate:

> "(6) (7) To say that the test of any legislation is what may be done thereunder without any limitation whatever is an absurdity, for every conceivable class of legislation has inherent in it the possibility of unconstitutional acts of enforcement. The two cases above cited referred to what would be the reasonable permanent effect of the legislation. The rule, as expressed by the Supreme Court, is that the state may incidentally, by reasonable regulations for the benefit of the general public, regulate but not prohibit the individual's exercise of his civil rights.
>
> (8) Since the ordinance here in question is solely a regulation of the use of the public streets, preserving them for the benefit of the public against obstructions and not a restriction on what may be uttered or published, the cases cited for the proposition that the state may not suppress civil liberties except in conformity with the 'clear and present danger' rule are not in point."

In this regard, we also desire to call attention to another well established principle that only one against whom an ordinance or statute has been unconstitutionally applied, unless its language is such that it cannot otherwise be applied, may take advantage of its unconstitutionality because of such improper application. **Cox v.**

Louisiana, 85 S. Ct. 453, 463; **United States v. Raines**, 362 U. S. 17, 80 S. Ct. 519, 522.

> ". . . one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." **United States v. Raines**, 362 U. S. 17, 80 S. Ct. 519, 522.

III.

Point III of Petitioner's Argument Is Without Merit.

In his argument number III petitioner argues that the first sentence of the last paragraph of Section 1142 is too vague and overbroad to meet First-Fourteenth Amendment demands. He has no argument directed to this theory except the statement adopting the argument from the preceding "paragraph" of his brief.

We feel respondent has fully answered these contentions in Sections I and II of this brief. We therefore, adopt these two sections in reply to this point or section of petitioner's brief.

We have heretofore cited and quoted from the recent decision of this Honorable Court in **Cox v. State of Louisiana**, 379 U. S. 536, 85 S. Ct. 453 (1965). We again direct attention to this case because we feel it has particular application here for the reason that there is great similarity in the statute there involved and the part of the ordinance here under attack. Both by their terms proscribe loitering or standing so as to block or obstruct free passage on the sidewalk. Neither the statute in Cox, nor the first sentence of the last paragraph of 1142 which we feel petitioner erroneously seeks to lift from its context and attacks here, provides for warning by a police officer prior to arrest.

While the statute in Cox was declared unconstitutional it appeared to be so declared only because it had been construed by the Supreme Court of Louisiana as to apply to public assemblies, conflicting with first amendment freedoms. Mr. Justice Goldberg discussed at length the distinction between ordinances or statutes confined in language and application to merely regulating the flow of traffic and those by force of language used or construction by the state courts impinge upon first amendment freedom.[1]

IV.

Point IV of Petitioner's Argument Is Without Merit.

Petitioner in this section of his argument contends for the reversal of the Alabama Court of Appeals decision because of alleged lack of evidence in the record to support a conviction under Count Two of the complaint. This argument is without merits for two reasons.

A.

THE EVIDENCE AND INFERENCES PROPERLY TO BE DRAWN THEREFROM SUPPORT A CONVICTION UNDER BOTH COUNTS ONE AND TWO.

Petitioner does not argue the invalidity of Ordinance 1231 of the City of Birmingham but in view of the narrow construction placed upon it by the Alabama Court of Appeals does not question its validity but chooses to take that court to task for holding the evidence sufficient to support this Count Two in **Shuttlesworth** while holding to to the contrary in **Phifer v. City of Birmingham**, 42 Ala. App. 282, 160 So. 2d 898.

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[1] 85 Sup. Ct. 453 and especially at pages 464-466.

As we understand the ruling of the Alabama Court of Appeals, that court considered that defendant Phifer had not been arrested on account of any incident related to a traffic violation or because he obstructed free passage on the sidewalk so as to force other pedestrians into the street reserved for vehicular traffic but because he came back to talk with Shuttlesworth after the latter's arrest and refused to leave after being warned three times to do so. In dealing with absence of evidence to convict Phifer under either Count One or Count Two, the Alabama Court of Appeals reached the following conclusions:

> "(6) Although the arresting officer testified that while he was pursuing Shuttlesworth into the store the defendant Phifer disappeared and he could not find him to arrest him at that time, we think it is clear from all the evidence that the officer himself did not consider that defendant had failed to comply with his order to clear the sidewalk, since he did not arrest him when he first came up to talk to Shuttlesworth, but kept urging him to 'move on'. We are of the opinion the evidence fails to prove the defendant guilty under count one of the complaint.
>
> (7) The charge in the second count of the complaint is for a violation of Section 1231, of the General City Code of Birmingham. This section appears in the chapter regulating vehicular traffic, and provides for the enforcement of the orders of the officers of the police department in directing such traffic. There is no suggestion in the evidence that the defendant violated any traffic regulation of the city by his refusal to move away from Shuttlesworth when ordered to do so.

The evidence is insufficient to sustain the verdict under either count of the complaint.'"[1]

The evidence in Petitioner Shuttlesworth's case is exactly the reverse. It is clear he was arrested for obstructing free passage on the sidewalk resulting in pedes-

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[1] The opinion in *Phifer v. City of Birmingham*, 42 Ala. App. 282, 160 So. 2d 898, 900, 901, clearly quotes the evidence relied upon by it to support these conclusions:

"Shuttlesworth was placed in custody and taken to the west curb to await transportation to the city jail, and while they were standing there the defendant came up and started conversing with Shuttlesworth. The witness told defendant Shuttlesworth was under arrest and he could not be allowed to talk with him, but Phifer continued to talk. The officer said: 'I informed him if he did not move away and discontinue his conversation with the defendant (Shuttlesworth) he too would be placed under arrest and taken to the city jail.' The witness was asked on cross-examination:

'Q. Now you arrested him at that time?'
'A. After I had asked him to move some three times.'
'Q. To move away from the Defendant Shuttlesworth?'
'A. Yes, sir.'

* * * * * * * *

'Q. And only after he insisted on talking to Reverend Shuttlesworth did you arrest him?'
'A. That's right.'

The witness stated further that six or seven police officers were present when Shuttlesworth and Phifer were placed in the police car.

One of these officers testified the arresting officer told Phifer to move on, that he would not be allowed to talk to Shuttlesworth. Phifer said 'I will go with him,' and Officer Byars stated: 'You are under arrest too.' The witness was asked: Q. 'What did he tell him he was under arrest for?' His answer was: 'Refusing to obey the lawful command of an officer.'

"Another officer testified: 'He (Phifer) came up and said he wanted to talk to Shuttlesworth, and Officer Byars told him he couldn't, that he was under arrest, and he said, "Well, if you do, I will have to arrest you too because I have told you to leave." And he said, "Well, I will have to be arrested." And he placed him under arrest for failing to obey an officer.'

Two other officers testified it was after Officer Byars had told Phifer twice to move on, that he couldn't talk to Shuttlesworth, that the defendant was arrested."

trians having to get out into the street reserved for vehicular traffic, all in a group including Phifer and some ten others. Phifer and the others obeyed the request of the officer to cease obstructing free passage on the sidewalk, hence none was arrested, except Phifer and his conviction was reversed by the Alabama Court of Appeals.

The factual finding in **Shuttlesworth v. City of Birmingham,** 42 Ala. App. 296, 161 So. 2d 796, 797, which is amply supported by the evidence and inferences properly to be drawn therefrom is stated:

> "The evidence, as introduced by the City, tended to show that the defendant was a member of a crowd of about ten or twelve people standing on the corner of 19th Street and 2nd Avenue, North, in the City of Birmingham, and that this crowd was blocking the sidewalk to such an extent that some of the other pedestrians were forced to walk into the street to get around them. The crowd was accosted by one Officer Byars and asked to clear the sidewalk so as not to obstruct pedestrian traffic. The evidence further showed that the crowd remained and when requested to disperse for the third time by Officer Byars, defendant Shuttlesworth said, 'You mean to tell me we can't stand here in front of this store?' at which time Officer Byars informed the defendant that he was under arrest. Officer Byars testified that at the time of the arrest everyone had moved or was moving away except Shuttlesworth. After being told that he was under arrest, Shuttlesworth moved away saying, 'Well, I will go into the store.' Officer Byars then followed Shuttlesworth into Newberry's Department Store and took him into custody."

We respectfully urge that the Alabama Court of Appeals was correct in holding both counts one and two are sufficiently supported by the evidence.

Review of the ruling of the Circuit Court denying the motion of Shuttlesworth to exclude the evidence was properly sustained because there was evidence before the Court sufficient to make a prima facie case under Counts One and Two.[2]

On certiorari, the ordinary practice of this Honorable Court is not to review the weight or sufficiency of the evidence. On Page 19 of his brief petitioner alludes to and concedes this practice.[3]

Cases of the United States Supreme Court supporting this rule include: **Whitney v. California**, 274 U. S. 397, 47 S. Ct. 641, 71 L. ed. 594; **Milk Wagon Drivers Union v. Meadowmoor Dairies**, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836; **Portland R. L. & P. Co. v. Railroad Commission**, 229 U. S. 397, 33 S. Ct. 829, 57 L. ed. 1248.

Of course, we are aware that if there was an entire absence of any evidence showing the commission of any offense charged by the City the principle asserted in **Thompson v. City of Louisville**, 362 U. S. 199, 80 S. Ct. 624, 4 L. ed. 2d 654, would apply.

We think the evidence recited summarized by the Court of Appeals of Alabama in the Shuttlesworth case[4] which we have quoted ante page 34 is more than adequate to support a conviction of petitioner, Shuttlesworth, under

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[2] Tarver v. State, 85 So. 855, 17 Ala. App. 424; Drummond v. State, 67 So. 2d 280, 37 Ala. App. 308; Martin v. State, 81 So. 851, 17 Ala. App. 73.

[3] The statement is made by petitioner in connection with the testimony of Officer Byars, which he says under ordinary practices of this Court "must escape strict review here" (Brief, p. 19).

[4] 161 So. 2d 796, at page 797.

both Counts one and two of the complaint and is consistent with the record in this case.[5]

But if we were to concede arguendo that the evidence was not sufficient to convict under Count Two of the complaint, it was undoubtedly sufficient to convict under Count One. In fact, we fail to find any serious contention of insufficiency of evidence to support the complaint other than the argument under Section IV of Petitioner's brief which is confined to Count Two.

B.

THE CONVICTION OF PETITIONER SHOULD BE SUSTAINED EVEN IF THERE WAS COMPLETE ABSENCE OF EVIDENCE TO SUSTAIN A CONVICTION UNDER COUNT TWO.

The judgment entry appearing on pages 10 and 11 of the record shows that petitioner was found guilty as charged in the complaint, but was fined and sentenced for one offense only. That is, the sentence was the same whether rested upon Count one or Count two.[6]

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[5] The evidence is considered in "Statement of the Case", this brief, ante pages 2-8.

[6] "Sec. 4. General Penalty. Any person who shall fail or neglect to perform any duty imposed by this code, or who shall fail or neglect to do or perform any act or series of acts required to be done or performed by this code, or who shall fail or neglect to perform any duty, act or series of acts, the neglect or failure of performance of which is declared unlawful or made punishable by this code, or who shall do or perform any act or series of acts which is prohibited, made unlawful, or made a misdemeanor by this code, or who shall violate any provision of this code, shall, upon conviction therefor, be punished by a fine not exceeding one hundred dollars or by imprisonment in the city jail, workhouse or house of correction or at hard labor upon the streets or public works for not exceeding six months, or by both such fine and imprisonment; and, in the event the fine and costs are not presently paid the defendant shall be required to work out the fine and costs under the direction of the city authorities, allowing one dollar for each day's

Where a judgment of conviction is general, it will not be reversed because of the insufficiency of the evidence as to some of the counts, where it is sufficient as to one count and the sentence is within the statutory limit which may be imposed on such count. **U. S. v. Parillo,** 299 F. 714; **Clift v. U. S.,** 22 Fed. 2d 549; **Barton v. U. S.,** 25 Fed. 2d 967, cert. denied 49 S. Ct. 24, 278 U. S. 621, 73 L. ed. 542.

This is analogous to the proposition that a general conviction on a complaint will not be reversed where one of several counts is good, if the sentence imposed did not exceed that which could be imposed under the good counts. **Pierce v. U. S.,** 40 S. Ct. 205, 252 U. S. 239, 64 L. ed. 542, affirmed 245 F. 878; **Claassen v. United States,** 142 U. S. 140, 146, 12 S. Ct. 169, 35 L. ed. 966. In fact the Circuit Court of Appeals of the Sixth Circuit in **Clift v. U. S.,** 22 Fed. 2d 549, 550, cites **Claassen** in support of the principle asserted in the preceding paragraph.

The rule referred to in the last two preceding paragraphs is also accepted in other state jurisdictions[7] and has been applied by the Alabama Appellate Courts uniformly and without exception. **Andalusia Motor Company v. Mullins,** 183 So. 456, 28 Ala. App. 201, cert. denied

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service. No female shall be required to work on the streets of the city. The penalties provided in this section shall apply in all cases other than offenses for which a different penalty is specifically prescribed; provided, that the provisions of this section shall not apply to violations of official duty imposed by this code upon officers or employees of the city as such, unless the provision imposing the duty also expressly makes the violation thereof unlawful or punishable." General City Code of the City of Birmingham.

[7] Yeats v. Mooty, 175 So. 719, 128 F. Ca. 658 and Smith v. McLaughn, 184 P. 2d 177, 81 Cal. App. 2d 815, are both directly in point on the proposition that a general judgment must be sustained if the evidence sufficiently supports either of two or more counts of the complaint.

183 So. 460, 236 Ala. 474; **White v. Jackson,** 62 So. 2d 477, 36 Ala. App. 643; **White Roofing Co. v. Wheeler,** 106 So. 2d 658, 39 Ala. App. 662, cert. denied 106 So. 2d 665, 268 Ala. 695; **Morgan v. Embry,** 85 So. 580, 17 Ala. App. 276; **Jones v. Belue,** 200 So. 886, 241 Ala. 22; **Turnipseed v. Burton,** 4 Ala. App. 612, 58 So. 959; **Long v. Leith,** 16 Ala. App. 295, 77 So. 445.

CONCLUSION.

The Judgment of the Alabama Court of Appeals affirming petitioner's conviction should be affirmed and or the petition for certiorari dismissed.

Respectfully submitted,

EARL McBEE,
WILLIAM C. WALKER,
600 City Hall,
Birmingham, Alabama.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1965.

Fred L. Shuttlesworth, Petitioner, *v.* City of Birmingham. | On Writ of Certiorari to the Court of Appeals of Alabama.

[November 15, 1965.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was brought to trial in the Circuit Court of Jefferson County, Alabama, upon a complaint charging him with violating two sections of the General Code of the City of Birmingham, Alabama.[1] After trial without a jury, the court found him "guilty as charged in the Complaint," and imposed a sentence of imprisonment for 180 days at hard labor and an additional 61 days at hard labor in default of a $100 fine and costs. The judgment of conviction was affirmed by the Alabama Court of Appeals, 42 Ala. App. 296, 161 So. 2d 796, and the Supreme Court of Alabama declined review. 276 Ala. 707, 161 So. 2d 799. We granted certiorari to consider the petitioner's claim that under the Fourteenth Amendment of the United States Constitution his conviction cannot stand. 380 U. S. 905.

The two ordinances which Shuttlesworth was charged with violating are §§ 1142 and 1231 of the Birmingham General City Code. The relevant paragraph of § 1142 provides: "It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also

[1] This was a trial *de novo* on appeal from a judgment of conviction in the Recorder's Court of the City of Birmingham.

be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." Section 1231 provides: "It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer." The two counts in the complaint were framed in the words of these ordinances.[2]

The evidence was in conflict, but the prosecution's version of the facts can be briefly summarized. On April 4, 1962, at about 10:30 a. m., Patrolman Byars of the Birmingham Police Department observed Shuttlesworth standing on a sidewalk with 10 or 12 companions outside a department store near the intersection of 2d Ave. and 19th St. in the City of Birmingham. After observing the group for a minute or so, Byars walked up and "told them they would have to move on and clear the sidewalk and not obstruct it for the pedestrians." After some,

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[2] "Count One

"Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at, to-wit: 2nd Avenue, North, at 19th Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F.

"Count Two

"Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did refuse to comply with a lawful order, signal or direction of a police officer, contrary to and in violation of Section 1231 of the General City Code of the City of Birmingham."

but not all, of the group began to disperse, Byars repeated this request twice. In response to the second request, Shuttlesworth said, "You mean to say we can't stand here on the sidewalk?" After the third request he replied, "Do you mean to tell me we can't stand here in front of this store?" By this time everybody in the group but Shuttlesworth had begun to walk away, and Patrolman Byars told him he was under arrest. Shuttlesworth then responded, "Well, I will go into the store," and walked into the entrance of the adjacent department store. Byars followed and took him into custody just inside the store's entrance.[3]

I.

On its face, the here relevant paragraph of § 1142 sets out two separate and disjunctive offenses. The paragraph makes it an offense to "so stand, loiter or walk upon any street or sidewalk . . . as to obstruct free passage over, on or along said street or sidewalk." The paragraph makes it "*also* . . . unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." (Emphasis added.) The first count of the complaint in this case, tracking the ordinance, charged these two separate offenses in the alternative.[4]

Literally read, therefore, the second part of this ordinance says that a person can stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provi-

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[3] The record contains many references to a so-called "selective buying campaign" in which Birmingham Negroes were engaged at that time. There was no showing, however, of any connection between this campaign and the presence of the petitioner and his companions outside the department store on the morning of his arrest.

[4] See note 2, *supra*.

sion needs no demonstration.[5] It "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." *Cox* v. *Louisiana*, 379 U. S. 536, 579 (separate opinion of MR. JUSTICE BLACK). Instinct with its ever present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.[6]

The matter is not one which need be exhaustively pursued, however, because, as the respondent correctly points out, the Alabama Court of Appeals has not read § 1142 literally, but has given to it an explicitly narrowed construction. The ordinance, that court has ruled, "is directed at obstructing the free passage over, on, or along a street or sidewalk by the manner in which a person accused stands, loiters, or walks thereupon. Our decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense. . . . [T]here must also be a showing of the accused's blocking free passage . . . ." *Middlebrooks* v. *City of Birmingham*, — Ala. App. —, —, 170 So. 2d 424, 426.

The Alabama Court of Appeals has thus authoritatively ruled that § 1142 applies only when a person who stands, loiters, or walks on a street or sidewalk so as to obstruct free passage refuses to obey a request by an officer to move on. It is our duty, of course, to accept this state judicial construction of the ordinance. *Win-*

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[5] *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *NAACP* v. *Button*, 371 U. S. 415, 433, 435; Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–81, 96–104 (1960). Cf. *Smith* v. *California*, 361 U. S. 147, 151; *Baggett* v. *Bullitt*, 377 U. S. 360, 371.

[6] *Lovell* v. *City of Griffin*, 303 U. S. 444, 451; *Kunz* v. *New York*, 340 U. S. 290, 293; *Schneider* v. *State*, 308 U. S. 147, 163–164.

ters v. *New York*, 333 U. S. 507; *United States* v. *Burnison*, 339 U. S. 87; *Aero Mayflower Transit Co.* v. *Board of Railroad Comm'rs*, 332 U. S. 495. As so construed, we cannot say that the ordinance is unconstitutional, though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied.

The present limiting construction of § 1142 was not given to the ordinance by the Alabama Court of Appeals, however, until its decision in *Middlebrooks*, *supra*, two years after the petitioner's conviction in the present case.[7] In *Middlebrooks* the Court of Appeals stated that it had applied its narrowed construction of the ordinance in affirming Shuttlesworth's conviction, but its opinion in the present case, 42 Ala. App. 296, 161 So. 2d 796, nowhere makes explicit any such construction. In any event, the trial court in the present case was without guidance from any state appellate court as to the meaning of the ordinance.

The trial court made no findings of fact and rendered no opinion. For all that appears, that court may have found the petitioner guilty only by applying the literal—and unconstitutional—terms of the ordinance. Upon the evidence before him, the trial judge as finder of the facts might easily have determined that the petitioner had created an obstruction, but had subsequently moved on. The court might alternatively have found that the petitioner himself had created no obstruction, but had simply disobeyed Patrolman Byars' instruction to move

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[7] The petitioner's trial took place in October 1962. The Alabama Court of Appeals affirmed the judgment of conviction in November 1963. The *Middlebrooks* case was decided in October 1964. — Ala. App. —, 170 So. 2d 424. The *Middlebrooks* construction of the ordinance was adumbrated in *Smith* v. *City of Birmingham*, decided the same day. 42 Ala. App. 467, 168 So. 2d 35.

on. In either circumstance the literal terms of the ordinance would apply; in neither circumstance would the ordinance be applicable as now construed by the Alabama Court of Appeals. Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction under § 1142 cannot stand.

II.

We find the petitioner's conviction under the second count of the complaint, for violation of § 1231 of the General City Code, to be constitutionally invalid for a completely distinct reason. That ordinance makes it a criminal offense for any person "to refuse or fail to comply with any lawful order, signal or direction of a police officer." Like the provisions of § 1142 discussed above, the literal terms of this ordinance are so broad as to evoke constitutional doubts of the utmost gravity. But the Alabama Court of Appeals has confined this ordinance to a relatively narrow scope. In reversing the conviction of the petitioner's codefendant, the court said of § 1231: "This section appears in the chapter regulating vehicular traffic, and provides for the enforcement of the orders of the officers of the Police Department in directing such traffic." *Phifer* v. *City of Birmingham*, 42 Ala. App. 282, —, 160 So. 2d 898, 901.[8]

The record contains no evidence whatever that Patrolman Byars was directing vehicular traffic at the time he told the petitioner and his companions to move on. Whatever Patrolman Byars' other generally assigned

[8] Cf. *Shelton* v. *City of Birmingham*, 42 Ala. App. 371, 165 So. 2d 912, affirming the conviction of a defendant who refused to obey an officer's direction to get out of the middle of a street which had been closed to private vehicles and in which "police cars and fire engines were being used to move and quiet the crowd."

duties may have been,[9] he testified unambiguously that he directed the petitioner's group to move on, "to clear the sidewalk and not obstruct it for pedestrians." [10]

Five years ago this Court decided the case of *Thompson* v. *City of Louisville*, 362 U. S. 199. There we reversed the conviction of a man who had been found

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[9] Patrolman Byars testified that on the morning in question he was a "utility officer," and that as such he was "in charge of the direction and movement of all traffic at 3rd Avenue and 19th Street and four blocks in an east, west, north and south direction." He conceded that he was "not regularly placed" at the intersection where the arrest occurred, and that he had "nothing to do with the other officers who were also there."

[10] The record shows that the officer directing vehicular traffic at the intersection of 2d Ave. and 19th St. at the time of the petitioner's arrest was Officer Hallman. His relevant testimony was as follows:

"Q. Now, you observe on these corners from your position here when you police that corner, do you not?

"A. I try to.

"Q. Had you seen these people over there blocking traffic before you saw Officer Byars?

"A. I saw him standing over there talking to them.

"Q. Did you see them before he was talking to them?

"A. I saw them over there. I didn't pay any particular attention to them.

"Q. Did you get the impression they were waiting for the light to change?

"A. I couldn't answer that because I don't know what they had on their mind.

"Q. You formed no impression when you first saw them?

"A. No.

"Q. You took no note of them when you first saw them, is that right?

"A. Just saw them standing over there.

"Q. The only time you made note of them standing over there was when you saw the policeman assisting you talking to them?

"A. When I saw him over there talking to them. He wasn't assisting me.

"Q. He wasn't assisting you with your corner.

"A. No."

guilty in the police court of Louisville, Kentucky, of loitering and disorderly conduct. The proposition for which that case stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case. It goes, rather, to the most basic concepts of due process of law. Its application in Thompson's case turned, as MR. JUSTICE BLACK pointed out, "not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." 362 U. S., at 199. The Court found there was "no evidence whatever in the record to support these convictions," and held that it was "a violation of due process to convict and punish a man without evidence of his guilt." 362 U. S., at 206. See also *Garner v. Louisiana*. 368 U. S. 157.

No more need be said in this case with respect to the petitioner's conviction for violating § 1231 of the General City Code of Birmingham, Alabama. Quite simply, the petitioner was not in, on, or around any vehicle at the time he was directed to move on or at the time he was arrested. He was a pedestrian. Officer Byars did not issue any direction to the petitioner in the course of directing vehicular traffic, because Officer Byars was not then directing any such traffic. There was thus no evidence whatever in the record to support the petitioner's conviction under this ordinance as it has been authoritatively construed by the Alabama Court of Appeals. It was a violation of due process to convict and punish him without evidence of his guilt.

For these reasons the judgment is reversed and the case is remanded to the Court of Appeals of Alabama for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion on my understanding that *Middlebrooks* v. *City of Birmingham* is being read as

holding that § 1142 applies only when a person (a) stands, loiters or walks on a street or sidewalk so as to obstruct free passage, (b) is requested by an officer to move on, and (c) thereafter continues to block passage by loitering or standing on the street. It is only this limiting construction which saves the statute from the constitutional challenge that it is overly broad. Moreover, because this construction delimits the statute to "the sort of 'hard core' conduct that would obviously be prohibited under any construction," *Dombrowski* v. *Pfister*, 380 U. S. 479, 491–492, it may be legitimately applied to such conduct occurring before that construction.

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1965.

Fred L. Shuttlesworth, Petitioner, *v.* City of Birmingham. } On Writ of Certiorari to the Court of Appeals of Alabama.

[November 15, 1965.]

Mr. Justice Douglas, concurring.

I join Part II of the Court's opinion but reverse on Count I for a somewhat different reason. The police power of a municipality is certainly ample to deal with all traffic conditions on the streets—pedestrian as well as vehicular. So there could be no doubt that if petitioner were one member of a group obstructing a sidewalk he could, pursuant to a narrowly drawn ordinance, be asked to move on and, if he refused, arrested for the obstruction. But in this case the testimony is that the group dissolved when warned by the police, save only the petitioner.* At the time of the arrest petitioner was no longer blocking traffic. Section 1142 of the Birmingham General Code makes it unlawful to "obstruct the free passage of persons on . . . sidewalks." The ordinance, as it has been construed by the Alabama Court of Appeals, has been held to apply only to one who continues to block a sidewalk *after a police warning to move. Middlebrooks* v. *City of Birmingham*, — Ala. App. —, 170 So. 2d 424, 426. There was no such "obstructing" here, unless petitioner's presence on the street was itself enough. Failure to obey such an order, when one is not acting unlawfully, certainly cannot be made a crime in

*See Appendix hereto.

a country where freedom of locomotion (*Edwards* v. *California*, 314 U. S. 160) is honored. For these reasons I think there was no evidence, within the meaning of *Thompson* v. *City of Louisville*, 362 U. S. 199, to sustain the conviction and hence I would reverse the judgment outright.

APPENDIX.

Officer Robert L. Byars, who made the arrest, testified on cross-examination as follows:

"Q. How many persons were standing there at that intersection when you first observed it?

"A. Some ten or twelve.

"Q. Were they all colored or white people, or altogether or what?

"A. I didn't pay particular notice to the race.

"Q. You stood there a minute or minute and a half and then you went out and cleared the intersection?

"A. I went out and asked them to move.

"Q. Was that great big crowd out there and the intersection completely blocked? You testified you had half of the south-north cross walk free, that the defendants were not blocking half of the south-north cross walk, they were standing in the west part of the cross walk where they should be standing assuming they were going south, they were not blocking the east-west cross walk at all? Now, where was the crowd that was blocking?

"A. They were all standing on the sidewalk.

"Q. You mean the crowd?

"A. That's right, including the defendant.

"Q. Now, you placed the defendants where you have the X. Now, the crowd is what we are interested in now, the crowd they were blocking, where were they?

"Mr. Walker: We object. There has been no testimony that there was a crowd that was being blocked; the testimony is there was a crowd blocking the moving traffic.

"Q. Are these defendants charged then with assembling the crowd or something? Who were they blocking? Where were the persons they were blocking, these two defendants here?

"A. They were blocking half of the sidewalk causing the people walking east to go into the street around them.

"Q. The people walking east along what street?

"A. Along 2nd Avenue.

"Q. Along this way (indicating)?

"A. That's right.

"Q. The people walking along 2nd Avenue from west to east had to go around them?

"A. That is true.

"Q. While they stood there?

"A. That is true.

"Q. And you observed that for a [illegible]nute or minute and a half?

"A. That is true.

"Q. And then you went out and you required them to move on. Did you speak directly to the Defendant Shuttlesworth?

"A. I spoke to the people standing assembled there.

"Q. They all moved but him, is that correct?

"A. Not on the first request they didn't all move. Some began to move.

"Q. Well, all had moved by the time you made the arrest?

"A. Except Shuttlesworth.

"Q. Nobody was standing there but Shuttlesworth?

"A. Nobody was standing; everybody else was in motion except the Defendant Shuttlesworth, who had never moved.

"Q. Was he talking to you during this time?

"A. He made a statement to me on two occasions when I informed him to move on on three occasions.

"Q. Did he ask you where you wanted him to move?

"A. No.

"Q. Did you tell him where to move?

"A. I did not.

"Q. You didn't arrest anybody but Shuttlesworth?

"A. Not at that time."

Officer C. W. Hallman, who observed the above after having been called over by Officer Byars, testified on direct examination as follows:

"Q. About how many was in the group at that time, if you know?

"A. I would say five or six. It could have been more or less.

"Q. What happened to the group then, if anything?

"A. All of them dispersed except Shuttlesworth.

"Q. What happened after that?

"A. Officer Byars told him he was under arrest for blocking the sidewalk and placed him under arrest."

SUPREME COURT OF THE UNITED STATES

No. 5.—October Term, 1965.

Fred L. Shuttlesworth, Petitioner, v. City of Birmingham. } On Writ of Certiorari to the Court of Appeals of Alabama.

[November 15, 1965.]

Mr. Justice Fortas, with whom The Chief Justice joins, concurring.

I agree that Shuttlesworth's conviction must be set aside. But I am concerned lest the opinion of the Court be considered as indicating that Shuttlesworth can constitutionally be convicted of violating the Birmingham Code on the facts here presented. Any such conviction would violate basic constitutional guaranties. I would make this clear now.

The Court's opinion does not challenge the constitutionality of § 1142 of the Birmingham General City Code as that section was construed by the Alabama Court of Appeals two years after Shuttlesworth's conviction. But the opinion may be read to imply that if Shuttlesworth is now put to trial for violation of § 1142, as construed, the vice of the present conviction may be eliminated. I would make it clear that the Federal Constitution forbids a conviction on the facts of this record, regardless of the validity of the ordinance involved.

I agree that, as construed by Alabama two years after Shuttlesworth was convicted, § 1142 cannot be held unconstitutional on its face. I agree that if there were rational basis for charging Shuttlesworth with violating the section as so construed, he could be retried if Alabama should choose so vigorously to protect the sidewalks

of Birmingham. Civil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. Their cause confers no privilege to break or disregard the law.

But there is here no possible basis for a conviction which would be valid under the Federal Constitution. The accused provision would be unconstitutional as applied to Shuttlesworth's facts even after the plastic surgery by Alabama's Court of Appeals in 1964. *Middlebrooks* v. *City of Birmingham*, —— Ala. App. ——, 170 So. 2d 424.[1] A revision of the formula does not and cannot change the facts; and those facts do not permit the State to jail Shuttlesworth for his actions on April 4, 1962.

Taking the prosecution's version of the facts, it appears that Shuttlesworth was one of a group of 8, 10 or 12[2] persons who at 10:30 a. m. on April 4, 1962, were accosted by a patrolman after they had stood for a minute or a minute and a half at 19th Street and 2d Avenue in Birmingham. They occupied one-half of the sidewalk. They were conversing among themselves. There is no suggestion of disorder or of deliberate obstruction of pedestrian traffic. After the first command by the patrolman, the group commenced to move away. The officer repeated his command, and Shuttlesworth said, "You mean to say we can't stand here on the sidewalk?" After the third command, Shuttlesworth said, "Do you mean to tell me we can't stand here in front of this store?"

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[1] As the Court's opinion herein points out, in *Middlebrooks*, the Court of Appeals stated that its narrowed construction of the ordinance had been the "ratio decidendi" of *Shuttlesworth*, decided a year earlier. But there is no indication of this in *Shuttlesworth* itself.

[2] Officer Renshaw testified there were 8, 10 or 12 people in the group (R. 40). Officer Byars testified to 10 or 12 (R. 17).

The officer then told Shuttlesworth he was under arrest. Shuttlesworth said he would go into the store. The officer followed and arrested him. There was no resistance. By this time everybody in the group except Shuttlesworth had moved away. The entire incident took less than four and one-half minutes, from arrival of Shuttlesworth and his friends at the corner to his arrest.

For this, Shuttlesworth was tried, convicted and sentenced to spend half a year at hard labor and to pay a fine of $100.

In my view, there is nothing in the facts which justified an arrest and conviction. Prior to the officer's command the situation was that a small group of people occupying one-half of the sidewalk were engaged in orderly conversation. Promptly upon the officer's command, the group began to disperse and only Shuttlesworth remained. He, alone, cannot be held to have blocked the sidewalk. His rhetorical questions may have irritated the patrolman; but a policeman's lot is not a happy one—and certainly, in context, Shuttlesworth's questions did not rise to the magnitude of an offense against the laws of Alabama. If one were to confine oneself to the surface version of the facts, a general alarm for the people of Birmingham would be in order. Their use of the sidewalks would be hazardous beyond measure.

But, this, of course, is fiction. It is facade for a narrower, but no less disagreeable, truth. On April 4, 1962, the Negroes of Birmingham were engaged in a "selective buying campaign"—an attempted boycott—of Birmingham's stores for the purpose of protesting discrimination against them. Shuttlesworth and his companions were Negroes.[2] They were standing in front of a department

[2] Testimony of Officer Renshaw (R. 49). Officer Byars testified that he didn't know what color they were (R. 27, 36).

store. Shuttlesworth, as an officer who participated in the arrest testified, was a "notorious" person in the field of civil rights in Birmingham.[4]

In my view the net effect of the facts in this case is inescapable. Shuttlesworth's arrest was an incident in the tense racial conflict in Birmingham. This may explain the arrest, but it adds nothing to its lawfulness. There is no basis in the facts and circumstances of the case for charging that Shuttlesworth was "blocking free passage" on the sidewalk, *Middlebrooks, supra*, at 426, or that he culpably refused to obey an order of an officer to move on, or remained after such an order so as to justify arrest, trial or conviction. Any attempt to punish Shuttlesworth in these circumstances would, in my view, violate the Fourteenth Amendment of the Federal Constitution.

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[4] The principal arresting officer testified that he did not recognize Shuttlesworth, but he had seen his picture on television. He had heard of him, had read that he had frequently been arrested, and that he had been in the Birmingham jail. Shuttlesworth's walk on April 4, 1962, started during a recess in a federal court civil rights trial in which he was involved. The trial had been publicized.